Supreme Court, U.S.
FILED

No. 98 2007 JUN 15 1999

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IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK; NEW YORK CITY POLICE DEPARTMENT; LEE P. BROWN, Commissioner, New York City Police Department; RAYMOND KELLY, First Deputy Commissioner; New York City Police Department, et al.,

Petitioners,

- against -

RONNIE COVINGTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 11, 1999

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit erred in holding that, under Heck v. Humphrey, 512 U.S. 477 (1994), in order to determine the accrual date of a civil rights plaintiff's false arrest claim, the District Court must hold a factual hearing on whether success on plaintiff's false arrest claim would inevitably have impugned the validity of his conviction, had it been obtained, where:

(a) plaintiff commenced his § 1983 action after the expiration of the applicable statute of limitations running from the date of his arrest, and the false arrest claim is the sole claim remaining in the case; and

(b) at the time when plaintiff commenced his § 1983 action, there was no possibility of his being criminally convicted on the related criminal charges for which he had been arrested, in that they had been finally dismissed on speedy trial grounds.

LIST OF PARTIES OMITTED FROM CAPTION

Additional Petitioners:

ROBERT JOHNSTON, Chief, New York City Police Department; "A DOE", TOUR COMMANDER, 108 PCT., New York City Police Department; "B DOE", DESK LIEUTENANT, 108 PCT., New York City Police Department; "C DOE", SERGEANT-SUPERVISOR, 108 PCT., New York City Police Dept.; JACQUES GUILLOIS, Police Officer, 108 PCT., New York City Police Department; "D-DOE", POLICE OFFICER, 108 PCT., New York City Police Department; "FOUR OTHER POLICE OFFICERS", 108 PCT., New York City Police Department; County of Queens, New York; JOHN J. SANTUCCI, District Attorney, Queens County; "K DOE", Assistant District Attorney, Queens County.

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OPINIONS BELOW

The panel decision of the Second Circuit is reported at 171 F.3d 117 and appears in the Appendix at A1-A28. The memorandum and order of the U.S. District Court for the Eastern District of New York is reported at 1995 U.S. Dist. LEXIS 21621 and appears in the Appendix at A29-A37. The unreported memorandum and order of that Court denying modification of the prior order appears in the Appendix at A38-A42.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendments IV and XIV to the United States Constitution and 42 U.S.C. § 1983 are found in the Appendix at A43.

JURISDICTION

The Second Circuit issued its panel decision on March 18, 1999. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Summary of Argument

This Court should grant certiorari because the Second Circuit's decision conflicts with decisions from several other circuits and, also, so far departs from an accepted and usual legal rule as to call for the exercise of this Court's supervisory power.

The case concerns whether Heck v. Humphrey, 512 U.S. 477 (1994) ("Heck"), requires a factual hearing on the accrual date of a false arrest claim, the sole claim still at issue in this case. That claim was brought under 42 U.S.C. § 1983 by respondent Ronnie Covington, appearing pro se (hereinafter "plaintiff"), against petitioners City of New York and, originally, nearly 40 defendants, of whom 19 are still in the case ("petitioners").

While the District Court found that plaintiff's false arrest claim accrued at the time of his arrest, and dismissed that claim as untimely, the Second Circuit, in a 2-to-1 split decision, reversed that holding and remanded the case to the District Court for a factual hearing on the date of accrual of the false arrest claim.

That holding was based upon an incorrect application of Heck, which held that a claim for damages under 42 U.S.C. § 1983 that "necessarily demonstrates the invalidity of [a] conviction" may not be brought while the conviction stands. 512 U.S. at 481-82. In remanding this case, the Second Circuit majority overlooked Heck's plain recognition that not all claims arising out of the circumstances of an arrest and prosecution would inevitably impugn the validity of the related conviction. 512 U.S. at 487 n.7. Indeed, some such claims could never do so, as with the paradigm isolated false arrest claim at issue here.

Petitioners maintain that, as a matter of law, a false arrest claim, standing alone, that is asserted in an action brought under 42 U.S.C. § 1983, could never be found to inevitably impugn the validity of a conviction or sentence, as Heck requires as a premise for a finding that the accrual

of a cause of action does not occur until after favorable disposition of the underlying criminal action.

In that it could never be found that plaintiff's false arrest claim did not accrue until after the speedy trial dismissal of the criminal charges against him, as the Second Circuit has posited might be the case, there is no need for a hearing to address that possibility.

Another reason for clarification of the impact, if any, of Heck in a case such as this is that, prior to plaintiff's initiating this action, the criminal charges against plaintiff had been dismissed on speedy trial grounds, and never have been and never will be tried. Therefore, no realistic assessment could be made of whether plaintiff's false arrest claim would have had any impact on his conviction, assuming, arguendo, such consideration were proper. In view of the final dismissal of the criminal charges, it could never definitively be held that incriminating evidence in addition to that seized or acquired upon arrest, if any, would not have been discovered and used in the prosecution of plaintiff.

The Second Circuit's holding that a factual inquiry must be conducted into whether success on plaintiff's false arrest claim would necessarily impugn the validity of a conviction that might have been obtained, but never will be, places an intolerable burden on the District Court to try to recreate with some reasonable accuracy the circumstances surrounding a nine-year-old arrest and prosecution on relatively minor charges. The holding would also necessarily but improperly require the District Court to speculate in that endeavor, about what evidence the State

might have discovered and presented in addition to that recovered upon the arrest.[1]

Certiorari should also be granted because the Second Circuit's holding contravenes the long-respected rule that false arrest claims accrue upon arrest and directly conflicts with numerous rulings by other Circuit Courts that address Heck but also follow the accepted rule that false arrest claims accrue upon arrest. Those decisions correctly recognize that success on a false arrest claim would not necessarily undermine the validity of a criminal conviction or sentence arising from the same general factual circumstances, in view of the myriad other sources of

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[1] Previously, the District Courts in the Second Circuit have followed the rule that a claim under § 1983 in the nature of false arrest accrues at the time of the arrest. E.g., Covington v. City of New York, 916 F. Supp. 282, 285-86 (S.D.N.Y. 1996). Following the decision of the Second Circuit from which we petition, however, one District Court in the Second Circuit recently held that "the only feasible rule, following Covington, is that a false arrest claim accrues at the termination of the prosecution (or at the time of arrest if no prosecution is pursued), even though a favorable termination is not an element of the claim. Any other rule would require the civil plaintiff to predict whether the evidence used to prosecute him will extend beyond that evidence which caused his arrest, in order to determine when his false arrest claim accrues." Pichardo v. New York Police Department, 98 Civ. 429 (S.D.N.Y.) (DLC), unreported order, May 10, 1999, vacating the prior dismissal of the false arrest claim as untimely. Pichardo v. New York Police Department, 1998 U.S. Dist. LEXIS 18025 (S.D.N.Y. 1998).

evidence that might be used to obtain a conviction in addition to that evidence, if any, seized or otherwise obtained at the time of an arrest. E.g., Kelley v. Myler, 149 F.3d 641 (7th Cir. 1998) (false arrest claim asserted in conjunction with malicious prosecution claim arising out of criminal prosecution dismissed as untimely where false arrest claim not asserted within statutory period running from time of arrest); Gonzalez v. Entress, 133 F. 3d 551, 553 (7th Cir. 1998) ("claim asserting a violation of the fourth amendment does not 'necessarily demonstrate[ ] the invalidity of [a] conviction'"); Washington v. Summerville, 127 F.3d 552 (7th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1515 (1998) (statute of limitations on false arrest claim began to run when plaintiff "knew or should have known that his constitutional rights had been violated--the date of his arrest"); Booker v. Ward, 94 F.2d 1052 (7th Cir. 1996), cert. denied, 519 U.S. 1113 (1997) (§ 1983 unlawful arrest claim accrued on day of arrest because "one can have a successful wrongful arrest claim and still have a perfectly valid conviction"); Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996) (Heck does not alter general rule that § 1983 claim seeking damages for unlawful arrest accrues when plaintiff knows of injury); Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) ("It is well established that a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest").

In sum, this Court should grant this petition for certiorari to clarify whether the Second Circuit has properly followed this Court's intentions expressed in Heck in addressing the important and frequently arising issue of the accrual date of civil rights claims relating to alleged unconstitutional arrests.

Statement of Facts

Plaintiff's amended pro se complaint alleged, inter alia, that he was arrested on February 17, 1990 without probable cause by New York City Police Officer Jacques Guillois and other unnamed police officers in the borough of Queens, New York. Amended Complaint ["AC"] ¶ 55. Plaintiff alleged that after enjoying a dinner and movies, he found that his car, which was parked opposite a Gallo wine distributor, was inoperable, and then inspected it for theft or vandalism (id.). As he was walking to the subway thereafter, several City police officers, allegedly at the instance of security guards employed by the wine distributor, and over plaintiff's protest, arrested him and charged him with stealing wine worth over $1,100 from the distributor and driving a van though the distributor's perimeter fence. AC ¶¶ 55-56. Plaintiff was thereafter charged with criminal trespass, a misdemeanor, and grand larceny and criminal mischief, both Class E felonies under New York law. AC ¶¶ 62-63.

On June 10, 1991, after plaintiff had allegedly been incarcerated for 478 days, the charges were dismissed under New York Criminal Procedure Law § 30.30, for failure to try the case within six months of its commencement. AC ¶ 70.

Plaintiff brought suit under 42 U.S.C. § 1983 within the three-year statute of limitations from the date of dismissal of the subject criminal charges, but after expiration of the three-year period from the date of his arrest. Plaintiff alleged deprivations of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as false arrest, battery,

libel, slander, malicious prosecution, false imprisonment and intentional infliction of emotional distress, and sought compensatory and punitive damages of $500,000 against each of the nearly 40 original defendants.

The City moved to dismiss on various grounds including the untimeliness of the false arrest claim. In support of the motion, the City submitted the docket from plaintiff's criminal case, and, in opposition, plaintiff submitted an affidavit and various forms.

District Court Decision

The District Court dismissed the complaint as to all defendants, either upon their motions or sua sponte. 1995 U.S. Dist. LEXIS 21621 (A29-A37). Due to both parties' submissions of factual materials outside the pleadings, the District Court treated the motions as ones for summary judgment.

Recognizing that the applicable statute of limitations for a section 1983 action brought in New York is three years, the District Court held that, under governing federal law, the false arrest claim accrued when plaintiff knew of his injury arising from the arrest (A33-A34). Deeming the complaint filed on June 2, 1994, the Court held that the false arrest claim was time-barred, because the statutory period had expired on February 17, 1993, three years after plaintiff's arrest and 16 months prior to his commencing suit (A34).

Dismissing plaintiff's federal malicious prosecution claim, the District Court correctly held that, although that claim was timely, plaintiff could not show, as required, that

the proceeding had terminated in his favor (A36-A37). Considering plaintiff's assertion that he had been the victim of a continuing conspiracy to violate his civil rights, the District Court also correctly held that "'[c]haracterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as 'a single series of interlocking events' does not postpone accrual of claims based on individual wrongful acts" (A34). The District Court further noted that plaintiff had not stated a claim for conspiracy, even construing his claims liberally, because he failed to allege "any facts that would tend to suggest the existence of a conspiracy" (AA35). The Court next held all of plaintiff's state claims time-barred in view of New York's applicable one-year limitations period. (A35-36).

In a subsequent memorandum and order, the District Court denied plaintiff's motion to alter, amend or vacate the judgment dismissing his claims for malicious prosecution and wrongful imprisonment (no new argument having been raised concernng the false arrest claim) (A38-42). Citing Heck, 512 U.S. at 484, the District Court clarified that it had not dismissed the wrongful imprisonment as time-barred, but had, instead, as but one element of damages in plaintiff's claim for malicious prosecution, which had been properly dismissed due to the absence of a termination of the charges in plaintiff's favor (A41).

Court of Appeals Decision

In a split 2-1 decision (A1-A28), the Court of Appeals, having previously declined to consider any of plaintiff's claims on appeal except that for false arrest, held that Heck required a remand to the District Court for a

determination whether success on plaintiff's false arrest claim would necessarily imply the invalidity of any conviction or sentence that might have resulted from the dismissed criminal proceedings against him. 117 F.3d at 123 (A13).[2] The Second Circuit majority reached this result even though it reasoned that it was not "inevitable" that success on a false arrest claim would necessarily impugn the validity of a conviction or sentence arising out of the same incident that gave rise to the false arrest claim. 117 F.3d at 123 (A12). The Second Circuit also inconsistently--albeit, we believe, correctly--found that causes of action for false arrest accrue "at the time of the arrest." 117 F.3d at 123 (A13).

The Second Circuit majority recognized, as petitioners had urged, that Heck had not addressed the application of its rule in a situation where the conviction at issue was merely potential, rather than actual. 117 F.3d at 124 (A14). The Circuit stated, however, that it agreed with the holding of Smith v. Holtz, 87 F.3d 108 (3d Cir.), cert. denied, 519 U.S. 1041 (1996), that the accrual date of a civil rights action in a potential conviction case that otherwise met the requisites of Heck with respect to implying the invalidity of the subject conviction should also run from the date of final dismissal of the criminal charges.

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[2] The Second Circuit had denied plaintiff's motion to reinstate his appeal, which had been dismissed for failure to prosecute, on any claim other than for false arrest, finding that an appeal on any other issue would be frivolous within the meaning of 28 U.S.C. § 1925(e). 171 F.3d at 121 (A7).

The dissenting judge would have held that plaintiff's false arrest claim accrued upon his arrest and had properly been dismissed as untimely asserted. 171 F.3d at 125-30 (A16-30). Initially, the dissent pointed out the critical, determinative differences between such a claim and one for malicious prosecution, with only the latter claim requiring the demonstration of a successful termination of the criminal proceedings, and, therefore, only the latter having a rationale for accrual upon favorable termination of such proceedings. 171 F.3d at 125-27 (A16-22).

The dissenter cogently concluded that "[a] claim for damages based upon a false arrest does not necessarily impugn the validity of a conviction should a prosecution be instituted," 171 F.3d at 125 (A17), citing this passage from Heck, 512 U.S. at 487 n.7 (171 F. 3d at 126, A19):

> a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still outstanding conviction. Because of doctrines like independent source and inevitable discovery, . . . and especially harmless error, . . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE IMPACT, IF ANY, OF HECK V. HUMPHREY, 512 U.S. 477 (1994), ON THE ACCRUAL DATE OF FALSE ARREST CLAIMS BROUGHT UNDER 42 U.S.C. § 1983 AND VACATE THE CIRCUIT COURT'S NOVEL REQUIREMENT THAT A HEARING BE HELD ON WHETHER SUCCESS ON AN ISOLATED FALSE ARREST CLAIM WOULD NECESSARILY IMPLY THE INVALIDITY OF AN ENTIRELY HYPOTHETICAL CONVICTION ON DISMISSED CRIMINAL CHARGES. THIS UNWARRANTED HOLDING DEPARTS FROM WELL-RECOGNIZED PRINCIPLES GOVERNING THE ACCRUAL OF CLAIMS, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND CREATES AN IMPOSSIBLE AND WHOLLY UNNECESSARY TASK FOR THE DISTRICT COURT.

This case involves a critically important issue in the administration of justice in the federal courts that frequently arises in cases brought under § 1983: when a fasle arrest claim accrues. The threshold determination of accrual is of fundamental importance in deciding whether the claim is timely under the relevant statutes of limitations, which protect against stale claims.

The Second Circuit majority's conclusion that, to decide the issue of the date of accrual of a false arrest claim, a District Court hearing must now be held, nine years after plaintiff's subject arrest and prosecution, which would essentially require a full trial not only of plaintiff's false arrest claim but also of criminal charges that were dismissed eight years ago on speedy trial grounds, departs from the usually applicable rules of accrual, conflicts with decisions in other circuits, and is practically infeasible. Certiorari should therefore be granted to clarify that Heck does not require such a proceeding.

A. The Second Circuit's Holding Is Not Reconcilable with the Essential Nature of Claims in the Nature of False Arrest.

It is well recognized that a claim accrues when a person knows that he or she has been wronged. In a § 1983 case, this Court has instructed, the question of accrual may be answered by comparing the § 1983 claim with the most similar state tort cause of action. Heck, 512 U.S. at 483, citing Carey v. Piphus, 435 U.S. 247, 257-58 (1978).

The Second Circuit's determination that a hearing must be held on the issue of accrual, because plaintiff's false arrest claim might not have accrued until after the dismissal of the criminal prosecution, fails to recognize the fact--critical for analysis of the accrual issue--that plaintiff knew that he had been wronged by a false arrest, if indeed he was, at the time of the arrest. No sound reason has been

presented why it should not, therefore, be found that his cause of action for false arrest accrued at that time.

In the case of a claim of false arrest, or an arrest without probable cause, all relevant facts are known to or may be discovered by the arrestee, as well as the arrestor, at the time of the arrest. The damages that may be sought cover only the time of detention up until the issuance of process or arraignment. Heck, 512 U.S. at 484. Further, there is no bar to a civil suit based upon a claim of false arrest, although, if advisable, such suit could be stayed pending determination of the issue of probable cause in the related criminal proceedings, if any were instituted.[3]

In the case of a civil rights claim in the nature of malicious prosecution, in contrast, while the fact of the initiation of an action is known when an indictment or complaint is filed, other critical elements of the cause of action, including a favorable termination, cannot be known until later. Moreover, the full amount of damages that may be recovered, including those for any arrest or imprisonment, discomfort or injury to health, loss of time, deprivation of society or loss of reputation, also cannot be known until the dismissal of the criminal charges. See Heck, 512 U.S. at 484. Prosecution of a civil rights claim

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[3] Plaintiff was never precluded by ignorance or any other factor from asserting a timely section 1983 claim based upon the alleged unwarranted interference with his civil rights occasioned by his arrest. According to his own allegations, prior to his arrest, he had done nothing other than eat dinner, see several movies and check out his car, when the police accused him without basis of breaking into and robbing the wine distributor. AC ¶ 50-55.

in the nature of malicious prosecution is, therefore, neither possible nor practicable until the termination of the underlying proceeding.

This Court held in Heck that the § 1983 claim at issue there, in which the criminally convicted plaintiff whose conviction was on appeal alleged an improper investigation leading to his arrest, destruction of exculpatory evidence and use of an improper voice identification procedure at trial, was closest in nature to a common law claim of malicious prosecution. 512 U.S. at 484. Such action, this Court properly reasoned, "provides the closest analogy . . . because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process." Id.

In holding that Heck requires a factual inquiry into the time of accrual of plaintiff's false arrest claim, the Second Circuit improperly failed to distinguish between plaintiff's bare false arrest claim, which had the potential for being waged without necessarily impacting on or conflicting with his criminal case, and a case in the nature of malicious prosecution. The latter, unlike the former, necessarily attacks the conviction itself, and thus could never be independently conducted without running a risk of direct conflict in the results achieved in the civil and criminal arenas.[4]

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[4] Indeed, the difference in the elements comprising the two claims is highlighted by the Second Circuit's own different treatment of the malicious prosecution and false arrest claims on appeal. The Circuit declined even to hear plaintiff's appeal of the District Court's dismissal of the

(continued...)

The Second Circuit majority's conclusion that a hearing on the issue of accrual was required by its decision in Woods v. Candela, 47 F.3d 546 (2d Cir. 1995) ("Woods II"), misreads the import of that decision.[5] Regardless of

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[4] (...continued)
former, due to plaintiff's failure to show a termination in his favor, see A36-37, A40-41, allowing an appeal only of the dismissal of the false arrest claim. Such distinction plainly illustrates that successful termination of the criminal proceeding in favor of the accused, a critical factor in Heck, see 512 U.S. at 487, had no relevance to plaintiff's false arrest as opposed to his malicious prosecution claim. The mere fact of termination as opposed to its manner, moreover, does not implicate the problem Heck addressed of the inevitable risk of inconsistency of results in the related criminal and civil proceedings.

[5] Prior to the initiation of Woods's § 1983 action, the New York Supreme Court, Appellate Division, Second Department, had reversed Woods's criminal conviction and dismissed the indictment. People v. Woods, 189 A.D.2d 838, 841-43 (N.Y. App. Div., 2d Dept., 1993). The state appellate court held that Woods's suppression motion should have been granted, due to its finding that Woods had been arrested after illegal detention and questioning, which produced evidence that was used to convict him. Woods commenced his section 1983 action in federal court four months after the issuance of the state appellate decision. After the Second Circuit affirmed the District Court's dismissal of Woods's civil rights claims as untimely, Woods v. Candela, 13 F.3d 574, 575 (2d Cir. 1994) (Woods I"), this Court vacated that decision in light of Heck, 513 U.S.
(continued...)

the nomenclature used, as the dissent herein correctly reasoned, 171 F.3d at 129-30 (A27-29), Woods II, in substance, concerned a constitutional claim most akin to the common law claim of malicious prosecution, as in Heck, in that Woods challenged prosecutorial acts which had led to his criminal conviction, not merely a false arrest that was unrelated to any subsequent conviction, as here.[6] As the District Court recognized in this case, in denying plaintiff's motion to modify the judgment of dismissal, a claim in the

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[5] (...continued)
801 (1994), and remanded the case. The Second Circuit thereafter reinstated Woods's § 1983 claim as having accrued upon final disposition of the criminal action in his favor, rather than upon his arrest. Woods II, 47 F.3d 545. The Second Circuit properly recognized on remand that, because Woods's § 1983 action had alleged violations of his constitutional rights that had led to his conviction and sentence, which violations rested on the very same factual grounds as the those asserted in support of reversal of his criminal conviction, the allegations in the § 1983 action necessarily implied that his conviction was unlawful, such that, under Heck, those § 1983 claims had not accrued until the reversal of his conviction.

[6] Woods had withdrawn his "malicious prosecution" claim, absent an ability to show malice, leaving merely a general § 1983 challenge to a conviction obtained based upon unconstitutional seizure of evidence that had been critical in obtaining the conviction. In contrast here, plaintiff challenged no conviction and did not allege in his 72-paragraph complaint that evidence had been seized or statements taken from him upon his arrest, much less that any evidence or statement should have been suppressed.

nature of malicious prosecution allows recovery for all damages suffered from arrest onward, the remedy sought by Woods (A41).

In Woods II, it had to be found that success on plaintiff's § 1983 attack on his prior conviction, an "actual, compensable injury," Heck, 512, U.S. at 487 n.7, which was obtained based upon evidence improperly seized at the time of his arrest, would necessarily have been inconsistent with the validity of his conviction. This case, in contrast, solely concerns plaintiff's claim of false arrest, which is unrelated to any sustainable claim of wrongful prosecution leading to a legally unwarranted conviction.

By including the phrase "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," 512 U.S. at 486, and thus addressing civil rights claims for actions other than allegedly unconstitutional convictions or imprisonments, we respectfully submit that this Court never intended to include damages suffered solely from a false arrest. Nor did this Court intend that factual hearings would have to be held on the accrual date of false arrest claims, when there is no issue as to the date of the arrest. This Court, further, never meant Heck to overrule the well-recognized general principle, as relevant in § 1983 cases as in all others, that a cause of action accrues at the time an injury is inflicted, and that claims must be timely prosecuted in accordance with applicable statutes of limitation.

B. The Second Circuit's Holding Creates an Impossible Task for the District Court, Particularly Given the Absence of Any Past, and Impossibility of Any Future, Conviction.

Heck held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 489-90. We believe that Heck does not govern this case for the plain reason that there was no conviction or sentence or even the possibility of one at the time plaintiff commenced this action.

That Heck should be limited to situations involving actual, or, at a minimum, to potential actual, convictions is demonstrated by this Court's primary holding therein (512 U.S. at 486-87 [emphasis in original]):

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction and sentence invalid, [n.6] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable

> under § 1983. Thus when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . .

That passage makes it plain that Heck was concerned with actual convictions and cannot properly be applied in a case where there was no possibility of a conviction at the time plaintiff's action was commenced.[7] Indeed, if Heck did apply here, arguendo, one would have to posit that plaintiff's claim still had not accrued, an absurdity that the law cannot acceptably accommodate.

This Court also explicitly stated in Heck that if "the plaintiff's [federal civil rights] action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," a § 1983 cause of action arises and the statute of limitations on the action begins to run, when the plaintiff knows or should have known that his constitutional rights have been violated. Heck, 512 U.S. at 487 (emphasis in original). This Court thus exempted from the Heck rule civil rights actions that "'even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.'"

This reasoning, accompanied by repeated emphasis on the existence of a conviction, shows that Heck has no

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[7] We reiterate that, although plaintiff was incarcerated at the time he commenced this action, that incarceration was not related to the arrest for which he claims damages in this case.

proper application where at the time the civil rights action was commenced there was no possibility of a conviction relating to the charges giving rise to the civil rights action.

Aside from the facial inapplicability of Heck to the this case, the Second Circuit utterly failed to address the stunning impracticability of the task assigned to the District Court of attempting to determine whether success on a false arrest claim would necessarily impugn the validity of a related conviction where the conviction at issue was not only potential rather than actual, but also where it would never ultimately be obtained. In any case where criminal charges have been dismissed prior to trial--not an uncommon scenario--one could never know whether a conviction might not have been obtained based upon evidence that the prosecution acquired independently of the alleged false arrest. Even if constitutionally admissible incriminating evidence still were not available at the time of dismissal of the charges, it might later have been obtained through a myriad of circumstances that could never be predicted with reasonable accuracy. The question whether the validity of a conviction or sentence would necessarily be impugned by success on a false arrest claim thus could never conclusively be answered in a case where the criminal charges had been dismissed without a trial.

While courts in two federal circuits have held that the Heck analysis may be applied in situations involving potential rather than actual convictions, Smith v. Holtz, 87 F.3d 108, 112-13, and Washington v. Summerville, 127 F.3d 552, neither case presented a situation analogous to that presented here. In both cases, at the time that the defendants urged that the civil rights claims had accrued, there still remained a possibility of a future conviction.

In Smith, the subject civil rights claims alleged fabrication of evidence and other claims that necessarily went to the heart of the conviction, and there was no assertion that they accrued at the time of arrest. The civil defendant merely contended that they accrued after the reversal of the plaintiff's first criminal conviction and prior to his exoneration on retrial. The Third Circuit correctly held that the subject claims did not accrue until after the final favorable disposition of the charges upon retrial.

Washington involved a § 1983 action claiming false arrest and malicious prosecution that was brought after the related criminal case had been dismissed pursuant to a nolle prosequi, determination, following which another prosecution of the same charges was possible. In accordance with the authority of Booker v. Ward, 94 F.3d 1052, which involved an past conviction, the Seventh Circuit nevertheless held in Washington that the false arrest claims would not "inevitably undermine a conviction because a plaintiff can wage a successful wrongful arrest claim and still have a perfectly valid conviction." 127 F.3d at 556. The Court adhered to the usual rule that "the statute of limitations on Washington's [false arrest] claims began to run when he knew or should have known that his constitutional rights had been violated--the date of his arrest . . . ." Id.

Washington's reasoning applies with even more force in this case, where no conviction has been or can ever be obtained. Thus, the Second Circuit improperly relies on Smith and Washington for the proposition that Heck may apply in a case in which the subject conviction is entirely hypothetical.

This Court should, therefore, grant this petition to clarify the application of Heck in a case where no conviction has been or ever will be obtained, and, thereafter, vacate the Second Circuit's remand of this case to the District Court for a hearing on the accrual date of plaintiff's false arrest claim and reinstate the District Court's dismissal of that claim.

CONCLUSION

For the reasons set forth, petitioners respectfully ask this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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June 11, 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997
(Submitted: March 31, 1998) (Decided: March 18, 1999)

Docket No. 96-2026

RONNIE COVINGTON,

Plaintiff-Appellant,

v.

THE CITY OF NEW YORK; NEW YORK CITY POLICE DEPARTMENT; LEE P. BROWN, Commissioner, New York City Police Department; RAYMOND KELLY, First Deputy Commissioner, New York City Police Department; ROBERT JOHNSTON, Chief, New York City Police Department; "A DOE", TOUR COMMANDER, 108 PCT., New York City Police Department; "B DOE", DESK LIEUTENANT, 108 PCT., New York City Police Department; "C DOE", SERGEANT-SUPERVISOR, 108 PCT., New York City Police Dept.; JACQUES GUILLOIS, Police Officer, 108 PCT., New York City Police Department; "D-DOE", POLICE OFFICER, 108 PCT., New York City Police Department; "FOUR OTHER POLICE OFFICERS", 108 PCT., New York City Police Department; County of Queens, New York; JOHN J. SANTUCCI, District Attorney, Queens County; "K DOE", Assistant District Attorney, Queens County,

Defendants-Appellees.

BEFORE: PARKER, Circuit Judge, EGINTON* and GLASSER,** District Judges.***

PRELIMINARY STATEMENT

Appeal from a judgment of the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), entered June 5, 1995, dismissing plaintiff's civil rights complaint, and from a judgment of the court entered November 9, 1995 denying plaintiff's motion to vacate the June 5, 1995 judgment.

Vacated and Remanded. Judge Glasser dissents with a separate opinion.

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* The Honorable Warren W. Eginton, Senior United States District Court Judge for the District of Connecticut, sitting by designation.

** The Honorable I. Leo Glasser, Senior United States District Court Judge for the Eastern District of New York, sitting by designation.

*** Pursuant to 28 U.S.C. § 46(b) and an order of the chief judge of this court certifying a judicial emergency, this case was heard by an emergency panel consisting of one judge of this court and two judges of the United States District Court sitting by designation.

(Ronnie Covington, Pro Se, Comstock NY)
(Paul A. Crotty, Corporation Counsel of the City of New York, Margaret G. King, Assistant Corporation Counsel, New York, NY, of counsel), for Defendants-Appellees.

PARKER, Circuit Judge.

Ronnie Covington, pro se, appeals from a judgment of the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), entered June 5, 1995, dismissing his civil rights complaint, alleging, inter alia, a false arrest claim under 42 U.S.C. § 1983, and from a judgment entered November 9, 1995 denying Covington's motion to amend or vacate the June 5, 1995 judgment. The only question on appeal is whether the district court correctly dismissed Covington's false arrest claim as having been brought beyond the applicable three-year statute of limitations. Although more than three years had elapsed between the date the complaint was filed and the date of the allegedly false arrest, less than three years had elapsed between the filing of the complaint and the date of dismissal of the state criminal proceedings against Covington relating to the allegedly false arrest. Thus, the question in this case is when Covington's false arrest claim accrued so as to trigger the statute of limitations.

We hold that the answer to this question turns on whether a judgment in Covington's favor on the false arrest claim would have undermined the validity of any potential conviction in the criminal proceedings against him. See Heck v. Humphrey, 512 U.S. 477 (1994); Woods v.

Candela, 47 F.3d 545 (2d Cir. 1995) ("Woods II"). If a favorable determination on the false arrest claim would in fact have undermined the validity of any potential conviction against Covington resulting from the state criminal proceedings, then Covington's false arrest claim would not accrue until those criminal proceedings terminated, and his false arrest claim would not now be time-barred. However, because we are unable to make this determination on the basis of the record before us, we vacate the dismissal and remand this case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

On February 17, 1990, Covington was arrested for allegedly stealing numerous cases of wine from the premises of Ernst & Julio Gallo Wine Distributors, Inc. ("Gallo Wines") and for causing damage to property. Covington claimed that he was headed towards the subway, after having seen several movies and eaten dinner and after checking on his car that was parked across the street from Gallo Wines, when he was approached by various police officers and security guards associated with Gallo Wines. The police allegedly held Covington at gunpoint, and forcibly transported him to the police station, where he was compelled to confess. The police then formally charged Covington with Grand Larceny in the fourth degree, Criminal Mischief in the third degree, and Criminal Trespass in the third degree. Covington was transported to the Central Booking Unit in Queens, and imprisoned.

On June 10, 1991, the Criminal Court of the City of New York dismissed the criminal prosecution against Covington on the charges stemming from this arrest for the

People's failure to prosecute the case within the time required by New York's speedy trial provision. N.Y. Crim. Proc. Law § 30.30.

On June 2, 1994,[1] Covington handed to prison officials for transmittal to the court, a complaint alleging civil rights violations under 42 U.S.C. § 1983 for his false arrest and subsequent detention. The suit was brought against almost forty defendants, including the City of New York, the New York City Police Department ("NYPD"), the former Police Commissioner, Deputy Commissioner, and Police Chief, various police officers and supervisors, Queens County, its District Attorney and an assistant district attorney (collectively, the "City Defendants"), Gallo Wines, and various businesses, affiliates, officers and employees associated with Gallo Wines (collectively, the "Business Defendants"). Covington filed an amended complaint in November 1994.[2] Covington alleged false arrest, use of excessive force, malicious prosecution, and conspiracy to violate his civil rights.

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[1] Plaintiff's complaint was actually filed in the district court on July 18, 1994. However, as the district court pointed out, a prisoner's complaint is deemed "filed" on the date the complaint is delivered to prison officials for transmittal to the court, which in this case was June 2, 1994. See Covington v. City of New York, No. 94 CV 3382, 1995 WL 322222, at *2 (E.D.N.Y. May 23, 1995). See also Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993).

[2] Hereinafter, all references to Covington's complaint are to his amended complaint.

In December 1994 and January 1995, two groups of Business Defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the complaint had been filed after the applicable three-year statute of limitations had run. In February 1995, the City Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) on the grounds that: (1) the false arrest, excessive force, and state law claims were time-barred under the applicable statute of limitations; (2) the malicious prosection claim was legally insufficient; (3) the complaint did not allege facts sufficient to show a conspiracy; (4) Queens County and the NYPD were not suable entities; (5) the complaint failed to allege the personal involvement of certain defendants; and (6) the District Attorney was immune from suit.

In a Memorandum and Order dated May 23, 1995, the district court sua sponte converted the parties' Rule 12(b)(6) motions into motions for summary judgment under Rule 56(c) because the parties had submitted material outside the pleadings. Covington, 1995 WL 322222, at *2. The district court held that the applicable statute of limitations for § 1983 actions in New York was three years, but that federal law governed the date the limitations period would begin to run. Id. The district court rejected Covington's contention that the statute of limitations for the false arrest and excessive force claims began to run when the criminal prosecution against him based on the arrest in question was terminated on June 10, 1991. Instead, the court held that the limitations period began to run when Covington was arrested and allegedly battered, namely on or about February 19, 1990, and accordingly granted summary judgment in favor of the defendants. Id. at *3.

The district court also rejected Covington's claim that the limitations period had not run because the defendants were part of an ongoing conspiracy to violate his civil rights. Id. The court found that, even liberally construed, Covington's complaint failed to allege any facts that would tend to suggest the existence of a conspiracy. Finally, as to Covington's malicious prosecution claim, the district court reasoned that the claim was not time-barred because the limitation period only began to run when the underlying criminal action was conclusively terminated, which was June 10, 1991. The district court nevertheless dismissed that claim because Covington had failed to establish an essential element of the cause of action, namely that the criminal proceedings, which had been dismissed for failure to comply with New York's speedy trial requirement, had terminated in his favor. Id. at *3-*4.

Covington subsequently filed a motion pursuant to Rules 59(e) and 60(b) to alter and amend or vacate the district court's judgment. The district court denied the motion. Covington timely filed a notice of appeal in December 1995, but failed to file an appellate brief in accordance with this Court's scheduling order. Accordingly, this Court dismissed Covington's appeal and notified Covington that his case was closed and that he needed to file a motion for reinstatement if he wished to pursue the appeal. Covington filed a motion to reinstate the appeal, which we granted only with respect to that portion of his appeal concerning the dismissal of his false arrest claim. Covington v. City of New York, No. 96-2026 (2d Cir. July 25, 1997). We denied reinstatement as to Covington's remaining claims on the ground that they were frivolous within the meaning of 28 U.S.C. § 1925(e).

Accordingly, we now consider Covington's arguments only with respect to the false arrest claim.

II. DISCUSSION

We review de novo a district court's grant of summary judgment, Samuels v. Mockry, 77 F.3d 34, 35 (2d Cir. 1996), whether that grant arose from a motion for summary judgment or from a district court's conversion of a motion to dismiss into a motion for summary judgment. See Buti v. Perosa, S.R.L., 139 F.3d 98, 101 (2d Cir. 1998) (reviewing de novo a grant of summary judgment that was converted from a motion to dismiss). "Summary judgment is proper if, viewing all facts of record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication." Samuels, 77 F.3d at 35.

The court below correctly reasoned that although New York law provides the applicable statute of limitations, federal law governs the question of when a false arrest claim accrues. See Morse v. University of Vt., 973 F.2d 122, 125 (2d Cir. 1992). Generally speaking, under federal law, "'the time of accrual [is] that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980) (quoting Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977)). However, in the case of some actions brought under § 1983, this general rule is subject to the Supreme Court's analysis in Heck. There, the Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for

> other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus . . .

Heck, 512 U.S. at 486-87 (footnote omitted). As a corollary to this analysis, the Court stated, "the statute of limitations poses no difficulty while state challenges are being pursued, since the § 1983 claim has not yet arisen." Id. at 489. Thus, the Court held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." Id. at 489-90.

However, not all state convictions prevent § 1983 actions from arising. The Court in Heck explained:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 487 (footnotes omitted). Accordingly, in order to determine whether Covington's false arrest claim accrued at the time of the arrest or only when the prosecution against him on the charges relating to that arrest was dismissed, the question is whether "a judgment in favor of [Covington in the § 1983 action] would necessarily imply the invalidity of" any conviction or sentence that might have resulted from the prosecution of Covington resulting from the arrest. Heck, 512 U.S. at 487.

Under New York law, "a plaintiff claiming false arrest must show, inter alia, that the defendant intentionally confined him without his consent and without justification." Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). "A § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause, is substantially the same as a claim for false arrest under New York law." Id. (citation omitted). Additionally, "[t]he existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that action is brought under state law or under § 1983." Id. (quotation marks and citations omitted).

The inquiry as to whether a recovery on the § 1983 false arrest claim in this case would necessarily imply the invalidity of any conviction or sentence resulting from the criminal proceedings against Covington is inherently a factual one, as illustrated by Woods v. Candela, 13 F.3d 574 (2d Cir. 1994) ("Woods I"). In Woods, Joseph Candela, a New York State Trooper, had stopped the plaintiff's vehicle because it was similar to one that had

been seen near the scene of two robberies and a recent larceny. Candela asked Woods if he had any weapons in the car. Woods replied that he kept a nightstick under the seat. Candela then searched the vehicle and found several items that matched the description of articles used in the robberies. Woods was then indicted in state court for robbery and criminal possession of a weapon. He moved to suppress the evidence found in his car search, but this motion was denied. Woods was subsequently convicted, but on appeal, his conviction was reversed on the grounds that the evidence should have been suppressed, since Candela had not had reasonable suspicion to detain and question Woods.

Woods then brought a 42 U.S.C. § 1983 suit against Candela in federal district court, alleging that Candela had violated his Fourth. Fifth, and Fourteenth Amendment rights. Woods later conceded that he had failed to state a cause of action for malicious prosecution pursuing only his Fourth and Fifth Amendment claims for false arrest and the illegal search arising therefrom. The district court then dismissed those claims as time-barred by New York's three-year statute of limitations. On appeal, this Court affirmed the district court's dismissal. Woods I, 13 F.3d at 575-6.

Subsequent to Woods I, the Supreme Court decided Heck and then vacated our decision in Woods I, remanding the case to us for reconsideration in light of Heck. Woods v. Candela, 513 U.S. 801 (1994).

On remand, we analyzed the nature of the New York state court decision. We observed that the New York state decision had "reversed Woods' conviction and dismissed the indictment after ruling that his suppression motion should

have been granted, due to defendant Candela's lack of a reasonable suspicion on which to detain and question Woods and thereafter search his vehicle." Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995). Following the reasoning of Heck, we held that Woods' § 1983 claim (based on his false arrest) did not accrue prior to the reversal of his conviction, and was therefore not time-barred, because, as made evident by the decision of the New York state court, "Woods's present Fourth and Fifth Amendment claims, which rest on the very same grounds, necessarily imply that his conviction was unlawful, and thus could not have been raised prior to the . . . reversal of his conviction." Id. This Court, therefore, has already held that a Section 1983 claim which is grounded in false arrest does not arise (in some circumstances) until such time as a criminal proceeding has been terminated in the plaintiff's favor. Contrary to the assertions in the dissent, Woods was not bottomed on a malicious prosecution claim, but consisted only of false arrest claims--claims that would have undermined the integrity of Woods' convictions had he succeeded on them.

Although in Woods, the plaintiff's claims in fact rested on the same grounds as the reversal of his conviction in the criminal proceedings, we note that this result is not inevitable in cases involving § 1983 claims based on an unlawful arrest. See Washington v. Summerville, 127 F.3d 552, 556 (7th Cir. 1997) ("[A] wrongful arrest claim, like many Fourth Amendment claims, does not inevitably undermine a conviction because a plaintiff can wage a successful wrongful arrest claim and still have a perfectly valid conviction."). Such a case might arise if there were independent evidence upon which a conviction could be obtained that was not in any way tainted by the unlawful

arrest. On the other hand, in a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence. In the present case, we are unable to determine whether success on Covington's Section 1983 false arrest claim would necessarily imply the invalidity of a possible conviction resulting from the criminal proceedings instituted against him based on that arrest, as we have no information before us as to the nature of the evidence which might have been available against him in those proceedings. Accordingly, we remand the case to the district court to make this determination.

We wholly agree with the dissent's assertion that there is a distinction between malicious prosecution and false arrest claims. We also agree that causes of action for false arrest accrue at the time of the arrest. The dissent, however, ignores the fact that Woods II, following the dictates of Heck, held that a federal Section 1983 claim grounded in false arrest simply does not accrue so long as a recovery would impugn a criminal conviction. We are bound in this case by the holding in Woods II.

The dissent recognizes, at page 10, that the rationale for tolling the statute of limitations is to "avoid parallel litigation over the issues of probable cause and guilt . . ." It goes on to state that "in this case there can be no possibility of creating two conflicting resolutions arising out of the same or identical transactions." That, of course, is true now that the criminal proceeding has been dismissed. So long as the criminal case remained pending, however, a parallel § 1983 case based upon a false arrest and wrongful search claim would create the distinct possibility of an

inconsistent result if the prosecutor's evidence was dependent upon a valid arrest. That is the reason why the § 1983 cause of action could not accrue during the pendency of the criminal case.

Finally, the City Defendants argue that the analysis in Heck, which we applied in Woods, cannot be applied in this case because there was no actual conviction or judgment in Covington's state criminal proceedings, which were dismissed under New York's speedy trial requirement. It is true that Heck did not directly address the issue of the accrual of claims that, if successful, wold necessarily imply the invalidity of a potential conviction on a pending criminal proceeding. However, we agree with the Third Circuit that the reasoning in Heck is applicable to such a case. See Smith v. Holtz, 87 F.3d 108 (3d Cir.), cert. denied, ____ U.S. ___, 117 S. Ct. 611 (1996); see also Washington, 127 F.3d at 556.

In Heck, the Court held that § 1983 actions, like civil tort actions, are not "appropriate vehicles for challenging the validity of outstanding criminal judgments." Id. at 486. In order to protect against such collateral attack against state convictions or sentences, the Court required proof that the state conviction or sentence has been invalidated before a § 1983 action could arise. As the Third Circuit stated, "these concerns apply equally to claims that, if successful, would necessarily imply the invalidity of a future conviction on a pending criminal charge." Smith, 87 F.3d at 113. The Third Circuit further explained:

> If such a claim could proceed while criminal proceedings are ongoing, there would be a potential

> for inconsistent determinations in civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit. In terms of the conflicts which Heck sought to avoid, there is no difference between a conviction which is outstanding at a the time the civil rights action is instituted and a potential conviction on a pending charge that may be entered at some point thereafter.

Id.

It follows from this reasoning that if "success on [a § 1983] claim would necessarily imply the invalidity of a conviction in a pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist." Id. Accordingly, if, as we noted before, success on Covington's § 1983 claim would necessarily have implied the invalidity of any conviction which may have resulted from the state criminal proceedings relating to the arret, then Covington's false arrest claim would not accrue until after that criminal prosecution was dismissed, and his false arrest cause of action under § 1983 would not now be time-barred.

III. CONCLUSION

For the foregoing reasons, we vacate the dismissal and remand the case to the district court for further proceedings consistent with this opinion.

Glasser J. dissents

I respectfully disagree with the conclusion reached by the majority and would affirm the decision of the district court which dismissed the plaintiff's § 1983 claim bottomed upon his false arrest for the reason that his action was commenced more than three years after his cause of action accrued and was thus barred by the statute of limitations.

The fundamental flaw in the application of Heck v. Humphrey, 512 U.S. 477 (1994) to this case lies in the failure to distinguish the basic but crucial difference between the tort of false imprisonment (of which false arrest is merely a variant) and the tort of malicious prosecution--a difference that "in this context has escaped the collective wisdom of many courts." 512 U.S. 496. At the outset, it is important to note that that portion of his § 1983 action bottomed upon malicious prosecution was properly dismissed and this appeal before us concerns only the dismissal of his false arrest claim.

Heck reiterated the Court's teaching "that 42 U.S.C. § 1983 creates a species of tort liability" and that "to determine whether there is any bar to [a § 1983] suit, we look first to the common law of torts" 512 U.S. at 483.

It would be an affectation of legal research to cite a plethora of cases and the many treatises on the law of torts to confirm that the tort of false imprisonment is the unlawful detention or confinement of the plaintiff intentionally caused by the defendant. False arrest is simply an unlawful detention or confinement brought about by means of an arrest rather than in some other way and is in

all respects synonymous with false imprisonment. It is also generally required that the plaintiff be conscious of his detention or confinement. The interest sought to be protected by this tort is in the interest each of us has to remain free from restraint of movement and is actionable under common law and the Fourth Amendment where the unlawful detention or confinement is intentionally caused regardless of whether a criminal prosecution is instituted thereafter. The cause of action accrues at the time of the detention or confinement as does the running of the statute of limitations. Day v. Morgenthau, 909 F.2d 75, 79 (2d Cir. 1990) (as amended on rehearing), cert. denied, 506 U.S. 821 (1992) (day of alleged unlawful arrest was the day of accrual of plaintiff's claims contrary to plaintiff's contention that his claims accrued on the date of his arraignment). "[D]amages for that claim cover the time of detention up until the issuance of process or arraignment and not more." 512 U.S. at 484 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 888 (5th ed. 1984)).

Heck holds that a damages claim that "necessarily demonstrates the invalidity of a conviction" may not be brought while the conviction stands. 512 U.S. at 481-82. A claim for damages based upon a false arrest does not necessarily impugn the validity of a conviction should a prosecution be instituted.[1] That this is so becomes clear by

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[1] Houston v. Lack, 487 U.S. 266, 270 (1988) teaches that a prisoner's complaint is deemed filed on the date it is delivered to his jailer who, in effect, becomes the clerk of the district court. In this case, that date was June 2, 1994. The criminal charges against him were dismissed on June

(continued...)

considering the following illustrations. Assume, for example, an arrest is made and no statement is taken or evidence seized incident to it. A common law action for false arrest or an action pursuant to § 1983 is thereafter commenced and a verdict rendered in favor of the plaintiff. An indictment is, however, thereafter duly obtained and the plaintiff is convicted. The validity of the conviction is not at all impugned by the result of the action for false arrest. In Gonzalez v. Entress, 133 F.3d 551 (7th Cir. 1998), Judge Easterbrook stated it thus at 553: "Wrongful invasions of property are actionable . . . under state law and the fourth amendment, no matter what happens to the criminal prosecution. Suppose a person says something like 'I was arrested without probable cause and spent a night in jail until my wife came up with bail money.' That injury is compensable whether or not the person is later convicted--indeed, whether or not he is later prosecuted. The rationale of cases such as Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980), and Haring v. Prosise, 462 U.S. 306, 103 S. Ct. 2368, 76 L. Ed.2d 595 (1983), which hold that a criminal prosecution does not bar civil search and seizure claims under principles of preclusion (collateral estoppel or res judicata) is that a search can be lawful but the conviction entirely proper, or

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[1] (...continued)
10, 1991, and had that dismissal satisfied the favorable termination requirement of an action for malicious prosecution, his § 1983 action would have been timely. His cause of action for false arrest, however, accrued upon his arrest, February 17, 1990, and his § 1983 action bottomed upon that alleged wrong was time barred when he filed his complaint on June 2, 1994, which was more than three years after that cause of action accrued.

the reverse, and that some injury from a violation of the fourth amendment is unrelated to conviction."

Assume further, that evidence was seized or a statement taken incident to the unlawful arrest. The false arrest or § 1983 claim is immediately actionable even if the prosecutor never tries to use the evidence or statement at trial. And even if the evidence or statement is used at trial, the validity of the subsequent conviction would not necessarily be impugned by a verdict returned in favor of the plaintiff in the civil action. The Court recognized that in Heck when it wrote at 487, n.7 as follows: ". . . a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, . . . and especially harmless error, . . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful" (citation omitted). See also Kelley v. Myler, 149 F.3d 641 (7th Cir. 1998) which is on all fours with this case; Booker v. Ward, 94 F.3d 1052, 1056 (7th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 952 (1997) (holding that a § 1983 unlawful arrest claim accrued on a day of arrest because "one can have a successful wrongful arrest claim and still have a perfectly valid conviction."); Washington v. Summerville, 127 F.3d 552, 556 (7th Cir. 1997); cert. denied ____ U.S. ____, 118 S. Ct. 1515 (1998) (statute of limitations began to run when plaintiff "knew or should have known that his constitutional rights had been violated--the date of his arrest."); Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) ("It is well established that a claim of unlawful arrest, standing alone, does not necessarily implicate the

validity of a criminal prosecution following the arrest."); Copus v. City of Edgerton, 151 F.3d 646, 649 (7th Cir. 1998) ("The point is that it is possible for an individual to be properly convicted though he is unlawfully arrested, or his home unlawfully searched. The remedy for those constitutional violations is a civil action under § 1983 for money damages.") (emphasis added). It is only when the conviction and imprisonment are themselves constitutional wrongs, that Heck postpones the accrual of the claim until the conviction has been set aside. The point was made with exquisite clarity in Antonelli v. Foster, 104 F.3d 899, 901 (7th Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 104 (1997) by Judge Posner as follows:

> "We think it worth noting, to dispel any possible confusion, the difference between a suit premised here on the invalidity of confinement pursuant to some legal process, whether a warrant, indictment, information, summons, parole revocation, conviction or other judgment, . . . and a suit that complains of official misconduct unrelated to legal process--an unconstitutional arrest without a warrant, the gratuitous beating of the arrested person, ... In none of the [cited] cases in the second category official misconduct unrelated to legal process--is the unlawfulness of the plaintiff's being confined pursuant to legal process an implicit or explicit ingredient of his case. The principle of Heck is therefore inapplicable to those cases (as Heck itself makes clear, see 512 U.S. at 486-87 nn 6, 7 . . .)."

The § 1983 claim upon which Heck and the cases which apply it is premised upon the common law tort of malicious prosecution which, although often accompanying

an action for false arrest is a distinctly different tort and the distinction between the two is often confused. See W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on Law of Torts 888 (5th ed. 1984). The interest sought to be protected by this tort is the interest each of us has not to be sued or prosecuted unjustly. The elements of this tort are: (1) the commencement or continuance of a criminal proceeding, (2) without probable cause, (3) maliciously, (4) termination of the prosecution favorable to the plaintiff. See, e.g., DiBlasio v. The City of New York, 102 F. 3d 654 (2d Cir. 1996). Heck acknowledged the significant distinction between the torts of false arrest and malicious prosecution in 512 U.S. at 484:

> "The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but no more.' W. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on Law of Torts 888 (5th ed. 1984). But a successful malicious prosecution plaintiff may recover, in addition to general damages, 'compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society.'" (emphasis added)

It is precisely because an essential element that must be alleged and proved in an action for malicious prosecution is termination of the prior criminal proceeding favorable to

the accused that the Court observed that "[w]e think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." Heck. 512 U.S. at 486.

The portions of the opinion upon which the majority relies and is set out at ____ of their opinion are thus addressed to a § 1983 claim bottomed upon a claim for an allegedly unconstitutional conviction or imprisonment--a conviction or imprisonment pursuant to some legal process which must first be terminated favorable to the plaintiff. That requirement "precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction . . . . Furthermore, 'to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit'." Id. at 484.

As has been stated above, the appeal before this court is from the dismissal of the false arrest claim for damages which was commenced long after the cause of action accrued and at a time when the criminal prosecution was no longer pending and was properly dismissed. Thus, the "plaintiff's actions, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff [and] the action should be allowed to proceed, in the absence of some other bar to the

suit." Heck at 487. The statute of limitations was correctly held by Judge Nickerson to be a bar to the suit for false arrest and his determination is entirely consistent with Heck v. Humphrey and should be affirmed. Cases such as Smith v. Holtz, 87 F.3d 108 (3d Cir.) cert. denied, ____ U.S. ____, 117 S. Ct. 611 (1996) upon which the majority relies are cases in which plaintiff sought damages from his unlawful conviction and confinement--for malicious prosecution--and are therefore not applicable.

It is important to note that in cases such as Smith v. Holtz, the damages sought are for an unlawful conviction and confinement, unlike this case, in which the plaintiff seeks damages for false arrest only. The validity of an outstanding criminal judgment may be implicated in cases such as Smith but not in this one for the reason that where damages are sought for conviction and confinement, the action is for malicious prosecution and not for false arrest. That distinction was clearly explicated in Heck, at p. 484 thus:

> "The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but no more.'. . . . But a successful malicious prosecution plaintiff may recover, in addition to general damages, 'compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation

of the society.' (emphasis added and citations omitted)

After acknowledging that a "wrongful arrest claim does not inevitably undermine a conviction because a plaintiff can wage a successful wrongful arrest claim and still have a perfectly valid conviction." Washington v. Summerville, supra. The majority observe that "Such a case might arise if there were independent evidence upon which a conviction could be obtained that was not in any way tainted by the unlawful arrest. In the present case, we are unable to determine whether success of Covington's false arrest claim would necessarily imply the invalidity of a possible conviction resulting from the criminal proceedings instituted against him based upon that arrest, as we have no information as to the nature of the evidence which might have been available against him in those proceedings. Accordingly, we remand the case to the district court to make this determination." The remand would thus require the district court to ascertain whether, in order to obtain a conviction, the state would have to prove that Covington's arrest was valid.

The remand the majority would direct would place upon the district court an impossible and totally unrealistic burden. It would require that court to determine and assess the strength of all the evidence available to the state, to determine whether a motion to suppress evidence or statements based upon an alleged unlawful arrest or a claimed unreasonable search should be denied because any one or more of many exceptions would permit the evidence to be received, e.g., that the evidence seized was in plain view; would have been inevitably discovered; was obtained during an inventory search; was subject to a good faith

exception; was seized under exigent circumstances; when the statement was made the interrogation was no longer custodial; or whether the state had evidence entirely independent of an arrest or search that would have been enough to obtain a conviction such as the testimony of an eye witness or informant. It is that to which the Supreme Court was referring in 512 U.S. at 484 n.7.

I would emphasize that the action pursuant to § 1983 predicated upon the alleged false arrest, commenced more than three years after that cause of action accrued, was plainly time-barred and for reasons already stated would not, in any event, have impugned a criminal conviction as a reading of the following observation in Heck teaches:

> Thus, when a prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the validity of his conviction or sentence; if it would the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed even in the absence of some other bar to the suit. (emphasis mine)

The rationale for tolling the statute of limitations is to "avoid parallel litigation over the issues of probable cause and guilt. . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in

contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions." Heck at p. 484. In this case there can be no possibility of creating two conflicting resolutions arising out of the same transaction, nor is there any possibility of "a collateral attack on a conviction through the vehicle of a civil suit." Heck at p. 484. Clearly, the rationale of tolling the statute does not exist in this case.

Woods v. Candela, 47 F. 3d 545 (2d Cir. 1995) by which the majority believes itself to be bound does not require a reversal of the district court for the reason that the action there was for malicious prosecution. The per curiam opinion there correctly concludes: "Therefore, under Heck, Woods's § 1983 cause of action for damages arising from Fourth and Fifth Amendment violations did not accrue before that date [the Appellate Division's reversal of his conviction.]. Consequently, Woods's suit was not barred by the statute of limitations." The reversal of his conviction was a pre-requisite to his malicious prosecution claim because an element of that claim was favorable termination.[2]

---

[2] On page ___ the majority write that "Woods later conceded that he had failed to state a cause of action for malicious prosecution, pursuing only his Fourth and Fifth Amendment claims for false arrest and the illegal search arising therefrom." The words that are underscored do not appear in Woods v. Candela, 13 F.3d at 575 nor do such words appear at 13 F.3d at 576.

Similarly the majority's text at p. ___ that "Following the reasoning of Heck, we held that Woods's

(continued...)

It is also significant to note that Woods took particular note of the observation in Heck which I have already alluded to and regard as dispositive. In 47 F.3d at 546, the Court in Woods wrote:

> In Heck, the Supreme Court held that "A § 1983 cause of action for damages attributable to an unconstitutional conviction of sentence, does not accrue until the conviction or sentence has been invalidated." Heck, 512 U.S. at ___, 114 S. Ct. at 2374. The Court exempted from this rule actions that "even if successful, would not necessarily imply that the plaintiff's conviction was unlawful." Id. at ___ n.7, 114 S. Ct. at 2372 n.7 . . ., such as an action founded on an unlawful search whose

---

[2] (...continued)
§ 1983 claim (based on his false arrest) did not accrue prior to the reversal of his conviction" gratuitously add the words in parenthesis which are not to be found in Woods II, 47 F.3d 545.

The damages that would be available to Woods upon the favorable termination of his criminal case would include the damages sustained for his false arrest as Heck acknowledges at 512 U.S. at 484, viz:

> But a successful malicious prosecution plaintiff may recover, in addition to general damages, "compensation for any arrest or imprisonment . . . ." (emphasis mine)

That, I submit, is the reading that Woods II supports.

illegality would not affect the validity of the conviction. (emphasis mine)

I emphasize "conviction or sentence" because those words manifestly relate to the malicious prosecution pre-requisite of favorable termination. I have already indicated that when Covington's action was commenced there was no criminal conviction that would or ever would be invalidated.

For all of the foregoing reasons, I would affirm the decision of the district court.

RONNIE COVINGTON, Plaintiff, -against - CITY OF NEW YORK, et al., Defendants.

94 CV 3382

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1995 U.S. Dist. LEXIS 21621

May 23, 1995, Decided
May 30, 1995, FILED

DISPOSITION: [*1] Defendants' motions to dismiss and for summary judgment granted. Action dismissed as to all other defendants sua sponte. Plaintiff's complaint dismissed in its entirety.

COUNSEL: RONNIE COVINGTON, Plaintiff, pro se, Great Meadow Correctional Facility, Comstock, New York.

CONNORS & CONNORS, P.C., (John P. Connors, Jr., of counsel), Staten Island, New York, for defendants Borg-Warner Corp., James F. Bere, Donald C. Trauscht, Baker Industries, "G-Doe," Baker Protective Services, "H-Doe," Wells Fargo Guard Service, "I-Doe," "J-Doe," John Thomas, Merrill Lynch, William Schreyer, Daniel Tully, Merrill Lynch Capital Partners, and "L-Doe." CALLAHAN, SCHEPP, YUHAS, ADAMS & CARFORA, (Timothy Gillane, of counsel), New York, New York, for defendants Gallo Wine Distributors, David Taub, and Mel Halperin. PAUL A. CROTTY, Corporation Counsel of the City of NewYork (Jose A. Aquino, of counsel), New York City Law Department, New York, New York, for city defendants.

JUDGES: Eugene H. Nickerson, U.S.D.J.

OPINION
BY: Eugene H. Nickerson

OPINION: MEMORANDUM AND ORDER

NICKERSON, District Judge:

Plaintiff brought this action pro se under 42 U.S.C. § 1983 against almost forty defendants, including the City of [*2] New York, the New York City Police Department, the former Police Commissioner, Deputy Commissioner, and Police Chief, various police officers and supervisors, Queens County, its District Attorney and an assistant district attorney (collectively the "city defendants"); Ernest & Julio Gallo Winery, its sales company and distributor, and various officers (collectively "Gallo and affiliated individuals"); Merrill Lynch & Co., Merrill Lynch Capital Partners, and various officers (collectively "Merrill Lynch and affiliated individuals"); Borg-Warner Corporation and various officers (collectively "Borg-Warner and related individuals"); Baker Industries, Baker Protective Services and its President (collectively "Baker and affiliated individuals"); and Wells-Fargo Guard Services, its President, a supervisor, and a security guard.

Plaintiff alleges false arrest, use of excessive force, malicious prosecution, and a conspiracy to violate his civil rights.

Plaintiff amended his complaint on November 14, 1994. All defendants, except Gallo and affiliated individuals, have moved to dismiss the amended complaint

pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

I

The amended complaint alleges, in substance, the following.

On the evening of February 17, 1990, after seeing several movies and eating at a restaurant, plaintiff checked his car, which was parked across the street from the offices of Gallo Distributors, to make sure it had not been stolen or vandalized. He then headed on foot toward the subway station.

As plaintiff was enroute to the subway station, several police officers and a Wells Fargo security guard and supervisor grabbed plaintiff and slammed him against a steel bay door on the side of the Gallo Distributors building. They held plaintiff at gunpoint, arrested him, searched him and placed him in handcuffs. All this was done "at the request or direction of" the Wells Fargo security guard and supervisor.

The officers accused plaintiff of breaking into Gallo Distributors, stealing more than $1,100 worth of wine, and driving a van through the fence surrounding the building.

When plaintiff said he had not committed any crime and protested his arrest, they told him to "shut up" and then "battered and forcibly transported" him to the police station, where more officers joined in the conspiracy by trying to compel plaintiff to [*4] confess.

When they could not get a confession, the officers "battered and forcibly shoved" plaintiff into a bullpen and kept him handcuffed there "with several depraved, vicious and hardened criminals" for four hours.

The officers fingerprinted and charged plaintiff with Grand Larceny in the fourth degree, Criminal Mischief in the third degree, and Criminal Trespass in the third degree.

They then "battered and forcibly transported" plaintiff to the Central Booking Unit in Queens, where he again was "shoved" into a bullpen with more unsavory criminals for twelve hours.

The officers, along with employees and officers of Gallo and Wells Fargo, conspired with members of the Queens County District Attorney's Office "fraudulently, maliciously and without the necessary probable cause" to prosecute plaintiff for the offenses already described. They also conspired to present false testimony and withhold exculpatory evidence and to falsely imprison plaintiff during prosecution of the case.

On June 10, 1991, the Criminal Court of the City of New York dismissed and sealed the indictment.

As a result of these actions, plaintiff says he suffered injury to his reputation, extreme emotional [*5] distress, and verbal and physical abuse by the police and other prisoners. He seeks damages of $500,000 against each defendant.

The city defendants submit a copy of the docket from plaintiff's criminal case in state court. Plaintiff

submits an affidavit, and copies of various New York State Department of Corrections' directives, interdepartmental memoranda, and prison forms.

Because these parties have submitted matters outside the pleadings, the court considers the city defendants' motion as one for summary judgment under Federal Rule of Civil Procedure 56.

II

The court will grant summary judgment under Rule 56(c) if the evidence offered shows that there is no genuine issue as to any material fact and that the movants are entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On the motion the court views the record in the light most favorable to the non-movant and resolves all ambiguities and draws all reasonable inferences against the movants. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, [*6] 57 (2d Cir. 1987).

The applicable statute of limitations for § 1983 actions in New York is three years. See Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994); Owens v. Okure, 816 F.2d 45, 47 (2d Cir. 1987), aff'd, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989).

While state law supplies the limitations period for § 1983 actions, federal law governs the date an action accrues, that is, the date the limitations period begins to run. See Singleton v. City of New York, 632 F.2d 185,

191 (2d Cir. 1980), cert. denied, 450 U.S. 920, 67 L. Ed. 2d 347, 101 S. Ct. 1368 (1981). Under federal law, the statute of limitations accrues when the plaintiff knows or has reason to know of the injury which forms the basis of the action. Id.

The statute of limitations on plaintiff's § 1983 claims of excessive force and false arrest accrued no later than February 19, 1990, when he "knew of his injury arising from the alleged assault and false arrest." Id.

Plaintiff's complaint was filed in this court on July 18, 1994. But, as plaintiff correctly argues, a pro se prisoner's complaint is deemed "filed" on the date he or she delivers it to prison officials for transmittal to the court, see Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993), in this case on June 2, 1994. Nevertheless, plaintiff's excessive force and false arrest claims are barred because, as already explained, the limitations period on those claims began to run when plaintiff was arrested and allegedly "battered," and not, as he contends, when the criminal prosecution against him was terminated. Plaintiff alternatively seeks to avoid the time-bar by arguing that all his claims are part of an ongoing conspiracy to violate his constitutional rights and that the limitations period thus did not begin to run until the conspiracy ended, namely, when the criminal prosecution was terminated.

But "characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as 'a single series of interlocking events' does not postpone accrual of claims based on individual wrongful acts." Singleton, at 192 (citation omitted).

Moreover, plaintiff's complaint does not state a claim for conspiracy. He says the police, employees and officers of Gallo and Wells Fargo, and members of the Queens County District Attorney's Office conspired "fraudulently, maliciously and without the necessary probable cause" to prosecute him, to present false testimony and withhold exculpatory evidence, and to falsely imprison him during prosecution of the case.

The court construes pro se pleadings especially liberally, see Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), and does not apply a "heightened pleading standard" to § 1983 claims, see Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, , 113 S. Ct. 1160, 1162-63, 122 L. Ed. 2d 517 (1993).

But a complaint alleging conspiracy under § 1983 nevertheless must contain more than mere vague and conclusory allegations and should describe, with some degree of particularity, overt acts committed by the defendants in furtherance of the conspiracy. See Dwares v. New York, 985 F.2d 94, 99 (2d Cir. 1993); Fariello v. Rodriguez, 148 F.R.D. 670, 677 (E.D.N.Y. 1993); Brooks v. Lange, 1993 U.S. Dist. LEXIS 9164, 1993 WL 256553, at *3 (S.D.N.Y. July 7, 1993). Plaintiff fails to allege any facts that would tend to suggest the existence of a conspiracy.

To the extent that plaintiff intends to allege violations of state law, these claims also are time-barred. See N.Y. Civ. Prac. L. & R. § 215(3) (one-year statute of limitations on actions to recover damages for assault, battery, false imprisonment, malicious prosecution, and

defamation); N.Y. Gen. Mun. Law § 50-i (one-year and ninety day statute of limitations on tort actions against a city, county, or a city or county employee).

But the limitations period for claims of malicious prosecution under § 1983 begins to run only when the underlying criminal action is conclusively terminated. See Murphy v. Lynn, 53 F.3d 547, 1995 WL 264855 (2d Cir. 1995) (citing Singleton, at 189, 193). The criminal action against plaintiff was terminated on June 10, 1991, plaintiff "filed" his complaint on June 2, 1994, and thus his malicious prosecution claims is not time-barred.

To establish a claim for malicious prosecution, plaintiff must show (1) that defendants either commenced or continued a criminal proceeding against him (2) with actual malice and (3) without probable cause, and (4) that the proceeding terminated in his favor. See Russo v. State of New York, 672 F.2d 1014, 1018 (2d Cir. 1982); Parker v. Hearn, 695 F. Supp. 1421, 1425 (E.D.N.Y. 1988); Colon v. [*10] City of New York, 60 N.Y.2d 78, 468 N.Y.S.2d 453, 455 N.E.2d 1248 (Ct.App. 1983).

Plaintiff cannot show that the criminal proceedings terminated in his favor. Proceedings are terminated in favor of the accused "only when their final disposition is such as to indicate the accused is not guilty." Singleton, at 193; see also Russo, at 1019 (question is whether the failure to proceed "implies a lack of reasonable grounds for the prosecution").

The city defendants have submitted a copy of the docket from plaintiff's criminal case, showing that the criminal prosecution was dismissed for failure to prosecute

the case within the time required by New York's speedy trial provision. N.Y. Crim. Proc. L. § 30.30. Plaintiff has not contested the validity of this document.

Because a dismissal for failure to comply with New York's speedy trial requirement is no more probative of innocence than it is of guilt, the court concludes that, for purposes of establishing a malicious prosecution claim, the proceedings were not terminated in plaintiff's favor. Cf Hollender v. Trump Village Coop, Inc., 58 N.Y.2d 420, 461 N.Y.S.2d 765, 768, 448 N.E.2d 432 (Ct.App. 1983) ("adjournment in [*11] contemplation of dismissal" bars malicious prosecution claim); Witcher v. Children's Television Workshop, 187 A.D.2d 292, 589 N.Y.S.2d 454 (N.Y. App. Div. 1992) (where a criminal case apparently was dismissed for lack of a speedy trial, the dismissal did not "qualify" as a termination favorable to the accused); Martin v. Adler, 135 Misc. 2d 383, 515 N.Y.S.2d 400, 405 (Sup.Ct. 1987)) ("because the charges were dropped for neglect to prosecute, the merits were never reached [and] the absence of an affirmative finding of innocence thus forecloses a cause of action of malicious prosecution").

III

Defendants' motions to dismiss and for summary judgment are granted. The court also dismisses the action as to all other defendants sua sponte for the reasons already set forth. Plaintiff's complaint is dismissed in its entirety.

So ordered.

Dated: Brooklyn, New York
May 23, 1995
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RONNIE COVINGTON,

Plaintiff-Appellant, **94 CV 3382**

v.

THE CITY OF NEW YORK, et al., **MEMORANDUM AND ORDER**

Defendants-Appellees.

----------x

RONNIE COVINGTON
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P.O. Box 51
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Plaintiff pro se.

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(Jose A. Aquino and Scott Mason, of counsel)
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100 Church Street
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for city defendants.

NICKERSON, District Judge:

Plaintiff brought this action pro se under 42 U.S.C. § 1983 against almost forty defendants, including the City of New York, the New York City Police Department, the former Police Commissioner, Deputy Commissioner, and Police Chief, various police officers and supervisors, Queens County, its District Attorney and an assistant district attorney (collectively the "city defendants"); Ernest & Julio Gallo Winery, its sales company and distributor, and various officers (collectively "Gallo and affiliated individuals"); Merrill Lynch & Co., Merrill Lynch Capital Partners, and various officers (collectively "Merrill Lynch and affiliated individuals"); Borg-Warner Corporation and various officers (collectively "Borg-Warner and related individuals"); Baker Industries, Baker Protective services and its President (collectively Baker and affiliated individuals); and Wells-Fargo Guard Service, its President,

a supervisor, and a security guard. By Memorandum and Order dated May 23, 1995, familiarity with which is assumed, the court dismissed the complaint.

On September 28, 1995, the court received plaintiff's motion, dated June 2, 1995, "for an Order altering and amending and or vacating the judgment of the court entered on June 5, 1995." On the assumption that it was filed in a timely manner, the court denies the motion.

The Court dismissed plaintiff's claim for malicious prosecution because it found that the proceeding against him, which had been dismissed for failure to comply with New York's speedy trial requirement, had not terminated in his favor. Plaintiff relies on Vitellaro v. Eagle Insurance Company, 250 A.D.2d 770, 541 N.Y.S.2d 614, 615 (1989), for the principle that a dismissal on these grounds constitutes a favorable termination. Although one court in this district has cited Vitellaro, see Baasch v. Reyer, 827 F.Supp. 940, 943 (E.D.N.Y. 1993), plaintiff's reliance is misplaced.

Vitellaro rests on appellate division cases that predate the Court of Appeals' holding in Hollender v. Trump Village Cooperative, 58 N.Y.2d 420, 461 N.Y.S.2d 765 (1983). That opinion held that a plaintiff in a malicious prosecution case carries his burden of proving termination in his favor "only when the final disposition is such as to indicate innocence." Id. at 425-26, 768 (citations and internal quotation marks omitted). As another New York court has noted, the earlier cases cited in Vitellaro appear inconsistent with Hollender. See Witcher v. Children's Television Workshop, 187 A.D.2d 292, 294-95, 589 N.Y.S.2d 454, 456 (1992). See also Sokol v. Sofokles,

136 A.D.2d 535, 523 N.Y.S.2d 155 (1988) (plaintiff could not establish favorable termination because dismissal for failure to prosecute was not a decision on the merits).

This is not a case where it has been shown that the prosecutor explicitly or by implication abandoned the prosecution because the objective circumstances showed the person charged to be innocent. There are many reasons why a prosecutor cannot meet the speedy trial requirements. Many of these reasons have no relation to the guilt or innocence of the accused.

Plaintiff also says that the court erred in holding his § 1983 claim for wrongful imprisonment time barred. However, the court did not so hold. Rather, it considered his wrongful imprisonment claim as part of his malicious prosecution claim. See Heck v. Humphrey, ___ U.S. ___, ___, 114 S.Ct. 2364, 2371 (1994) ("[A] successful malicious prosecution plaintiff may recover, in addition to damages, compensation for any arrest or imprisonment . . . .") (citation and internal quotations omitted). If plaintiff had established a claim for wrongful prosecution, damages for wrongful imprisonment during such prosecution would flow naturally from this claim. Plaintiff's claim for wrongful imprisonment was dismissed not because it was time-barred, but because of the dismissal of his claim for wrongful prosecution.

Plaintiff's motion is denied.

So ordered.

Dated: Brooklyn, New York
November 2, 1995

Eugene H. Nickerson,
U.S.D.J.

CONSTITIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment XIV

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinnce, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
SEP 7 1999
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, et al.,
PETITIONERS

VS.

RONNIE COVINGTON,
RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent asks leave to file the attached brief and opposition to the Petitioners' Petition For A Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

[x] Respondent has previosly been granted leave to proceed in forma pauperis in the following courts:

1. United States District Court-Southern District of New York; and

2. United States Court of Appeals for the Second Circuit; and

3. United States District Court-Eastern District of New York.

Respondent's declaration in support of this motion is attached hereto.

Ronnie Covington

32pp

DECLARATION IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ronnie Covington, am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No_x_

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is ~~xxx~~ no, state the date of your last employment and the amount of salary or wages per month which you received. **1990 $1, 600.00 per month.**

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other sources? Yes_x_ No___ **prisoner program assignments.**

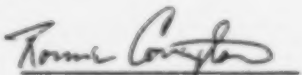
3. Do you own any cash or have a checking or savings account? Yes___ No_x_

4. Do you own any real estate, stocks,bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No_x_

5. List the persons who are dependent upon you for support and state your relationship to those persons. **none.**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 1999.



Ronnie Covington

98-2007

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, et al.,
PETITIONERS

VS.

RONNIE COVINGTON,
RESPONDENT

BRIEF IN OPPOSITION TO THE CITY OF NEW YORK'S PETITION FOR A WRIT OF CERTIORARI

RONNIE COVINGTON
93 A 6800
Respondent, pro-se
Clinton Correctional Facility
P.O. Box 2001
Dannemora, N.Y. 12929

QUESTIONS PRESENTED

1. Whether the judgment of the United States Court of Appeals for the Second Circuit (hereinafter **"Second Circuit"** should be affirmed for the reasons set forth in the Second Circuit's March 18, 1999 Opinion in this case?

2. Whether the United States Courts of Appeals should be allowed to continue remanding cases to the United States District Courts for factual determinations when the record(s) relating to those cases so remanded where certain facts are required to be ascertained so as to enable the district courts and or the United States Courts of Appeals to adequately and correctly decide those cases in accordance with the law?

3. Whether the judgment of the Second Circuit should be affirmed alternatively for, inter alia, the reasons set forth in the Honorable Justice Ginsburg's Concurring Opinion in Albright v. Oliver, 1994, 510 U.S. 266 at 276-280?

4. Whether a defendant in a pending criminal action pending a trial thereon or a probable cause determination thereon by the trial court may challenge the constitutionality or validity of the fact or duration of his pre-trial seizure in a suit for declaratory judgment and or monetary damages under 42 U.S.C. §1983?

5. Whether §1983 claims encompassing injuries for, inter alia, false arrest, false imprisonment, malicious prosecution and conspiracy should be separated into common-law tort catagories?

6. Whether a §1983 suit for compensatory damages attributable to an allegedly unreasonable continuous seizure wherein criminal charges in an underlying criminal action were dismissed and or the criminal court determined that no probable cause existed for the seizure of the Plaintiff and which encompasses and causes the Plaintiff therein, inter alia, the actual, compensable injuries of having been the subject and victim and suffered the effects of a court issued securing order [releasing the Plaintiff on his own recognizance, releasing the Plaintiff on bail and or committing the Plaintiff to the custody of the sheriff] unitl a subsequent court determination of whether probable cause existed for the seizure of the Plaintiff and or until the subsequent disposition of the criminal charges against him caused by the continuous false and deliberately misleading testimony and representations of the tort feasors against Plaintiff during the course of the seizure and the underlying criminal proceeding accrues upon the commencement of the seizure of the Plaintiff, or, upon the termination of the seizure of the Plaintiff and the dismissal of the criminal charges against him?

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STATEMENT OF JURISDICTION

The Second Circuit issued its panel decision on March 18, 1999. In addition, the Second Circuit properly analyzed and applied the jurisprudence of this Court in issuing a decision that is legally correct and consistent with federal law, however, this Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS APPEAL

The 4th and 14th Amendments to the United States Constitution and 42 U.S.C. §1983 are found in Petitioners' Appendix at page #-43-.

STATEMENT OF THE CASE

For the reasons set forth hereinbelow the Petitioners' arguments in support of their Petition are repleat with misstatements of fact and law. (see Rule 15(2) of the Rules of the United States Supreme Court).

The pertinent facts and Respondent's Statement of this Case are already fully set forth in the lengthly **". BACKGROUND"** section of the Second Circuit's subject decision as set forth in the Appendix of the Petition (hereinafter **"Petitioners' Appendix"**) at pages #-A4- through -A8- and thus because Respondent is satisfied with the Petitioners' presentation of those pertinent facts in the Second Circuit's decision at pages #-A4- through -A8- of the Petitioners' Appendix, in accordance with Rule 24.2 of the Rules of the United States Supreme Court these pertinent facts and Respondent's Statement of the Case

need not be rewritten here.

Respondent incorporates here as though set forth herein the pertinent facts as fully set forth in the lengthly **"I. BACKGROUND"** section of the Second Circuit's subject decision as set forth in Petitioners' Appendix at pages #-A4- through -A8-.

The Second Circuit declined to reinstate the remaining two (2) issues raised in Respondent's Brief For Plaintiff-Appellant namely (1) Respondent's complaint did not adequately allege conspiracy claims, and (2) the district court did not err in converting the Petitioners' motion to dismiss into a motion for summary judgment without notifying Respondent of its intentions to do so and afford Respondent an opportunity to submit additional information (in that after the district court dismissed Respondent's complaint Respondent then filed a motion to vacate and or amend the judgment pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure).

Although the district court dismissed those portions of Respondent's §1983 claims encompassing conspiracy and malicious prosecution in 1995, Respondent is now in the process of preparing a motion to amend the complaint and a proposed Second Amended Complaint to amend, inter alia, those deficiencies as the Second Circuit in Murphy v. Lynn, 1997, 118 F. 3d 938 cert. den. ___U.S.___, 118 S Ct. 1051 subsequently held that "a dismissal of criminal charges due to a violation of New York Speedy Trial principles (N.Y.C.P.L. §30.30) was termination in

favor of arrestee".

Respondent also incorporates here as though set forth herein the remainder of the Second Circuit's subject decision as set forth in Petitioners' Appendix at pages #-A8- through -A15-.

On June 15, 1999 the Petitioners filed their Petition with this honorable Court.

On July 27, 1999 this honorable Court granted Respondent an extension of time to September 1, 1999 to file this Brief and Opposition to the Petition.

ARGUMENT

I. THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE AFFIRMED FOR THE REASONS SET FORTH IN THE SECOND CIRCUIT'S MARCH 18, 1999 OPINION IN THIS CASE!

Plaintiff-Respondent incorporates here as though set forth herein, the Second Circuit's March 18, 1999 Opinion (171 F. 3d at pages #117 through 124).

For the reasons set forth in the Second Circuit's March 18, 1999 Opinion (171 F. 3d at pages #117 through 124) the judgment of the Second Circuit which vacated the judgment of the district court should be affirmed.

II. THE SECOND CIRCUIT CORRECTLY REMANDED THIS CASE TO THE DISTRICT COURT (AFTER VACATING THE JUDGMENT OF THE DISTRICT COURT) FOR FURTHER PROCEEDINGS CONSISTENT WITH THE SECOND CIRCUIT'S MARCH 18, 1999 OPINION WHERE THE SECOND CIRCUIT WAS UNABLE TO DETERMINE FROM THE CURRENT RECORD WHETHER A JUDGMENT IN RESPONDENT'S FAVOR WOULD HAVE UNDERMINED THE VALIDITY OF ANY POTENTIAL CONVICTION IN THE UNDERLYING CRIMINAL PROCEEDINGS AGAINST HIM

As this honorable Court is undoubtedly aware, Corporation Counsel of the City of New York (hereinafter "Corporation

Counsel") is counsel for the Petitioner "City of New York" and all of its officers and employees.

Corporation Counsel's reasoning that "the Second Circuit majority's conclusion that to decide the issue of the date of accrual of a false arrest claim, a Didstrict Court hearing must be held, 9 years after Plaintiff's subject arrest and prosecution, which would essentially require a full trial not only of Plaintiff's false arrest claim but also of criminal charges, that were dismissed eight years ago on speedy trial grounds, departs from the usually applicable rules of accrual, conflicts with decisions of other circuits and is practically infeasible ..." intentionally misconstrues the Second Circuit's opinion for several reasons:

Firstly, it would be an affectation of legal research to cite a plethora of cases and the many treatises on the law to confirm that the United States Courts of Appeals are empowered to remand cases to the district courts for factual determinations when the record(s) relating to those cases so remanded require further development and that additional facts be ascertained or clarified so as to enable the district courts and or the courts of appeals to adequately and correctly decide those cases in accordance with the law.

Secondly, the Second Circuit did not order that a mere hearing be held on an eight to nine year old case or issue, the Second Circuit specifically "remand[ed] ... for further proceedings consistent with this [March 18, 1999] opinion.".

Thus, the district court is not limited to simply holding a hearing, the district court may also use, if necessary, several other different options provided by the Federal Rules of Civil Procedure. For instance, (1) the district court may send advance notice to the parties that a hearing will be held on the specific issue and direct the parties to submit written briefs to the court in advance of the hearing, or (2) the district court may decide not to hold a hearing on the issue but instead may direct the parties to submit written briefs, motions to dismiss and or summary judgment motions, or (3) the district court may direct discovery (or additional discovery) of court, police and prosecutorial agency records to be had and produced to the court to aid in the court's determination, or (4) the disctrict court may direct that depositions, interrogatories, affidavits, admissions, stipulations, etc. be had on the issues and produced to the court to aid the court in its determination [NOTE: **In future cases, the parties and or their counsel will already know in light of the Second Circuit's March 18, 1999 decision to obtain any court, police and prosecutorial agency(s) records, and affidavits, depositions, interrogatories, admissions and or stipulations, etc. relating to the issues of inevitable discovery, independent source and or harmless error prior to submitting motions to dismiss or summary judgment motions**].

Thirdly, the underlying criminal action was not a case that was immediately dismissed, it was prosecuted by the Petitioners for 478 days (15 calendar months) the same amount of time of

Respondent's continuous seizure from February 18, 1990 through June 10, 1991 where in accordance with New York law the criminal case was required to be tried within six calendar months (N.Y.C.P.L. §30.30). Additionally, under New York law, to wit, N.Y.C.P.L. §160.50"(1) Upon the termination of a criminal action or proceeding against a person in favor of such person,... the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcemnt agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding shall be sealed. Upon receipt of notification of such termination and sealing: ...(c) all official records and papers, including judgments and orders of a court ... relating to the arrest or prosecution, including all duplicates and copies thereof, on file with **the** division of criminal justice services, any court, police agency or prosecutor's office shall be sealed and not made available to any person or public or private agency; (d) such records shall be made available to the person accused or to such person's designated agent ...".

It is apparent from Corporation Counsel's submission of copies of the state court docket (i.e., casefile folder jacket) to the district court (see Petitioners' Appendix at page #-A32-) that Corporation Counsel and Petitioners are already in possession

of the state court's file relating to the underlying criminal action, including, inter alia, police memo books, police reports and vouchers and Orders of the state court. Additionally and moreover, none of the personal property that was taken from Respondent by the Petitioners at the time of REspondent's arrest (i.e., approximately $400.00 United States currency, Respondnet's car keys, Respondnet's apartment keys and Respondent's wallet containing Respondent's identification) was confiscated as arrest evidence, and that all of Respondent's said personal property was returned to REspondent by Petitioners Santucci, "K-Doe" and New York City Police Department prior to the termination of the underlying criminal action. Respondent notes that Corporation Counsel's statement that "In the case of a claim of false arrest, or an arrest without probable cause, all relevant facts are known to or may be discovered by the ... arrestor, at the time of the arrest." (see Petition at page #14) renders their arguments that the Second Circuit's decision "is practically infeasible" all the more frivolous for obvious reasons. In fact, a classic example of just how easily workable and feasible the Second Circuit's March 18, 1999 opinion is exists in Covington v. City of New York, et al., 94 Civ. 4234 (WHP) [previously (SAS)] (which is the same case cited by Corporation Counsel in the Petition at page #5, n.1) and a case in which none other than Corporation Counsel was counsel for the Petitioner City of New York and its officers and employees and in which Respondent is the Plaintiff. In that case, the district court had previously ruled that Respondent's §1983

claims encompassing false arrest, false imprisonment were time-barred. (see Covington v. City of New York, et al., 1996, 916 F. Supp. 282 at 285-286 (S.D.N.Y.). However, prior to trial in that case, the Second Circuit issued its March 18, 1999 Opinion, whereupon Respondent's counsel in that case by letter-motion to the district court dated April 8, 1999 moved to reinstate Respondent's previously dismissed §1983 claims encompassing false arrest and false imprisonment on the grounds that "the only evidence for conviction was obtained pursuant to an arrest" quoting the Second Circuit's opinion 1999 U.S. App. LEXIS 4365 at *16; 171 F. 3d at123 (see Respondent's Appendix at page #1). Whereupon, Corporation Counsel, by letter to the district court dated April 16, 1999 stated "I write to inform the Court that defendant will not oppose plaintiff's request for reinstatement of his false arrest claim against Detective Kid." (see Respondent's Appendix at page #2). On April 21, 1999 a Stipulation Of Reinstatement Of Claim stipulating and agreeing between the parties to the reinstatement of Respondent's false arrest claims which was also signed by the Court and entered into the record (see Respondent's Appendix at page #3). Thus, the Second Circuit's remand of this case to the district court for further proceedings consistent with its March 18, 1999 Opinion cannot be said to be "infeasible".

Fourthly, the Second Circuit's remand of this case to the district court for further proceedings consistent with its March 18, 1999 Opinion does not, as Petitioners' aver, "depart

from the usually applicable rules of accrual" because in the Second Circuit the rules of accrual are flexible, to wit, "**Generally speaking**, under federal law, the time of accrual [is] that point in time when the Plaintiff knows or has reason to know of the injury which is the basis of his action." (Covington, 171 F. 3d at 121; Petitioners' Appendix at page #-A8-). The Second Circuit went on to quote at least one exception to this general rule, to wit, "... in the case of **some** actions brought under §1983, **this general rule** is subject to the Supreme Court's analysis in Heck. ...". Some other exceptions to this **general rule** are equitable estoppel, judicial estoppel, continuing violation' theory, etc. Petitioners, in support of their argument and reasoning for an absolute date of accrual for all §1983 claims encompassing injuries for false arrest, false imprisonment and unreasonable seizures aver that "In the case of a claim of false arrest or an arrest without probable cause, all relevant facts are known to or may be discovered by the arrestee, as well as the arrestor, at the time of the arrest." (Petition at page -14-). This same reasoning of Petitioners would also appear to apply to Plaintiffs in §1983 malicious prosecution actions (whose conviction(s) has been overturned) because such a malicious prosecution Plaintiff also would know that he had been wronged by a malicious prosecution between the time of his arrest and his subsequent conviction, however, as this honorable Court stated in Heck that Plaintiff's §1983 cause of action seeking damages for malicious prosecution does not

accrue until after his conviction has been invalidated and the §1983 action seeking damages in relation to that malicious prosecution cannot be commenced (or stayed) prior to the conviction being invalidated Heck at 489-490.

III. THE JUDGMENT OF THE SECOND CIRCUIT SHOULD BE AFFIRMED ALTERNATIVELY FOR, INTER ALIA, THE REASONS SET FORTH IN THAT PORTION OF THE HONORABLE JUSTICE GINSBURG'S CONCURRING OPINION IN ALBRIGHT V. OLIVER, 1994, 510 U.S. 266 AT 276-280!

That the Petitioners, within their Appellees' Brief before the Second Circuit and in the Petition and within their motions to dismiss fragmentated Respondent's complaint into separate common law tort causes of action, to wit, and inter alia, false arrest, false imprisonment, malicious prosecution and conspiracy so as to persuade the district court, the Second Circuit and this Court to dismiss all or part of Respondent's complaint as time-barred.

The district court and the Second Circuit fragmentated Respondent's complaint into separate common law tort catagories.

Nowhere within the complaint does Respondent allege "AS AND FOR A FIRST CAUSE OF ACTION - FALSE ARREST", AS AND FOR A SECOND CAUSE OF ACTION - FALSE IMPRISONMENT", AS AND FOR A THIRD CAUSE OF ACTION - MALICIOUS PROSECUTION" OR AS AND FOR A FOURTH CAUSE OF ACTION - CONSPIRACY".

The Amended Complaint specifically sets forth the rights which Petitioners initially deprived Respondent, including his 4th Amendment rights to privacy from unlawful searches, and seizures, his 5th Amendment rights to privacy from the

deprivation of liberty without due process of law, his 8th Amendment rights to privacy from cruel, and unusual punishments, and his 14th Amendment rights to privacy from the deprivation of liberty without due process of law, to privacy from the abridgement of the priveleges or immunities granted to him as a citizen of the United States and to Equal Protection of the Laws, which started with the initial unlawful seizure and false arrest of Respondent.

The Amended Complaint also sets forth such additional rights as the Petitioners conspired to deprive and, deprived Respondent and/or permitted or acquiesced in while they continued to conspire to deprive and deprived him, including when the Petitioners Guillois, "D-Doe", "Four Other Police Officers", "C-Doe", "B-Doe" and "-Doe" (1) took, or caused to be taken, Respondent's fingerprints [New York C.P.L. §160.10(1)(a)], photographs and palmprints [N.Y.C.P.L. §160.10(3)], (2) forwarded two copies of Respondent's fingerprints to the New York State Division of Criminal Justice SErvices, (3) gave the said Division of Criminal Justice Services report relating to Respondent (as defined in N.Y.C.P.L. §160.30) to Petitioners Santucci and "K-Doe" and gave two copies thereof to the Criminal Court of the City of New York and (4) brought Respondent, or caused Respondent to be brought, before said Criminal Court of the City of New York and fraudulently filed therewith a libelous felony complaint (as described in N.Y.C.P.L. §1.20[8]) charging Respondent with the crimes as set forth in the Amended Complaint and caused Respondent to be arraigned

thereon in said Criminal Court of the City of New York [N.Y.C.P.L. §140.20(1)] and continuously conspired to deprive, and deprived, Respondent of his said rights until said criminal action, to wit, Docket #90Q006636, was dismissed on June 10, 1991 [see Albright v. Oliver, 1994, 510 U.S. 266, 274; Albright v. Oliver, - Honorable Justice Ginsburg's Concurring Opinion, 510 U.S. at 276-280; Albright v. Oliver, - Honorable Justice Souter's Concurring Opinion, 114 S Ct. 820-822; and Albright v. Oliver, - Justices Stevens's and Blackmun's dissenting Opinion, 114 S Ct. 824-831].

In Albright v. Oliver, supra, a warrant was issued for Plaintiff Albright's arrest by Illinois authorities, and upon learning of it he surrendered and was released on bail, the prosecution was subsequently dismissed on the ground that the charge did not state an offense under Illinois law. Albright then instituted a civil rights action pursuant to 42 U.S.C. §1983 against defendant Oliver alleging therein that Oliver deprived him of substantive due process under the 14th Amendment - his "liberty interest" to be free from criminal prosecution except upon probable cause. The district court dismissed Albright's complaint for failure to state a claim. The Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the complaint [975 F. 2d 343 (1992)] and held that prosecution without probable cause is a constitutional tort actionable under §1983 only if accompanied by incarceration or loss of employment or some other "palpable consequence" [975 F. 2d 346-47].

This honorable Court subsequently affirmed 510 U.S. 266 (1994) albeit on different grounds. This Court stated "that it is the Fourth Amendment, and not substantive due process, under which Petitioner Albright's claims must be judged." Id at 271. This Court stated that Albright did "not claim Illinois denied him the procedural due process guaranteed by the 14th Amendment. Nor did he claim a violation of his Fourth Amendment rights, notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment." Id at 271. This Court then reinstated the well established law that "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims" (citations omitted) and further ruled that "We think this principle is likewise applicable here. The Framers considered the matter of pre-trial deprivations of liberty, and drafted the Fourth Amendment to address it..." (Id at 274) and "...the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." Id at 274.

Although the Court's plurality opinion "expressed no view as to whether Plaintiff [Albright's] claim would succeed under the Fourth Amendment, since he [did] not present that question in his petition for certiorari." (Id at 275), the Honorable Justice Ginsburg addressed the possible merits of Albright's

claim in her Concurring Opinion (Id at 276-281).

Respondent incorporates here as though set forth herein that portion of the Honorable Justice Ginsburg's Concurring Opinion in Albright v. Oliver, 1994, 510 U.S. 266 reported at pages 276 through 280 (excluding the last sentence thereof on page #280 which states "It was, however, a claim Albright abandoned in the District Court and did not attempt to reassert in this Court.").

The Honorable Justices Stevens and Blackmun in Part VI of their dissenting Opinion agreed with the Honorable Justice Ginsburg's reasoning stating:

> "A separate comment on Justice Ginsburg's opinion is appropriate. I agree with her explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable. Had it been conducted by a federal officer, it would have violated the Fourth Amendment. And, because unreasonable official seizures by state officers are deprivations of liberty or property without due process of law, the seizure of petitioner violated the 14th Amendment. Accordingly Justice GINSBURG is correct in concluding that the complaint sufficiently alleges a cause of action under 42 U.S.C. §1983...

Id at 307

> ...I agree with Justice GINSBURG that the officer's incomplete testimony at the preliminary hearing perpetuated the violation of petitioner's right to be free from unreasonable seizure, ante at 315..."

Id at 308, n.26.

It would also appear that the Honorable Justice Souter in his Concurring Opinion agrees with the Honorable Justice Ginsburg's

Fourth Amendment reasoning (114 S Ct. at 820-821).

The Honorable Justice Ginsburg's previously stated Concurring Opinion/reasoning in Albright, supra is further supported by this honorable Court's subsequent plurality opinion in Heck and the concurring opinions therein of the Honorable Justices Souter, Blackmun, Stevens and O'Connor at 512 U.S. at 498-500.

In Heck, Plaintiff Roy Heck was convicted for killing his wife. While his conviction was pending, Heck, proceeding pro se, filed a civil rights action in Federal District Court under 42 U.S.C. §1983. His complaint alleged that defendants, acting under color of state law, had engaged in an "unlawful, unreasonable, and arbitrary investigation" leading to Plaintiff's arrest; "knowingly destroyed" evidence "which was exculpatory in nature and could have proved [his] innocence; and caused "an illegal and unlawful voice identification procedure" to be used at Heck's trial. The district court dismissed Heck's action without prejudice, because the issues it raised "directly implicated the legality of Heck's confinement". When the Seventh Circuit Court of Appeals reached Heck's appeal from dismissal of his §1983 complaint, it affirmed the judgment and approved the reasoning of the district court: "If, regardless of the relief sought, the Plaintiff in a federal civil rights action is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the

Plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so" 997 F. 2d 355, 357 (1993).

That a fortiori then that Respondent's 4th, 5th, 8th and 14th Amendment claims necessarily imply that his subject seizure, custody, confinement and imprisonment were unlawful, and thus because "[u]nder New York law, the elements of a false imprisonment are: '(1) the defendant intended to confine the Plaintiff, (2) the Plaintiff was conscious of the confinement, (3) the Plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged' Broughton v. State of New York, 1975, 37 N.Y. 2d 451; see also Hygh v. Jacobs, 961 F. 2d 359, 366 [2nd Cir.] ("the elements of a claim of false arrest under §1983 are substantially the same as the elements of a false arrest under New York law")" Singer v. Fulton County Sheriff, 1995, 63 F. 3d 110, 118 [2nd Cir.]; Smith v. County of Nassau, 1974, 34 N.Y. 2d 18 ("Under New York law the common law tort of false arrest is a species of false imprisonment and both require a lack of probable cause for arrest"), under Preiser v. Rodriguez, 1973, 411 U.S. 475, Albright, supra, Heck, supra, Woods v. Candela, 47 F. 3d 546, Broughton, supra, Singer, supra, and Ostrover v. City of New York, 1993, 192 A.D. 2d 115 (1st Dept.), Respondent would not have been able to prove the fourth element of his §1983 claims encompassing False arrest and false imprisonment and malicious prosecution, i.e., that "the confinement was not otherwise privileged" until June 10, 1991 when Petitioners abandoned their unlawful seizure of Respondent

and the New York State Court dismissed the Petitioners' criminal prosecution of Respondent on the Motion of the Petitioners, and pursuant to N.Y.C.P.L. §30.30 for violation of the New York Speedy Trial statutes (see pages #1 and 2 of the said casefile folder jacket relating to the underlying criminal action that was submitted to the district court by Petitioners; see also Albright v. Oliver, at 276-280 [Ginsburg, J. concurring-concluding that "a criminal defendant released pretrial is... still 'seized' in the constitutionally relevant sense" and remains "effectively 'seized' for trial so long as the prosecution against him remain[s] pending"]; Albright at 307, and 308, n.26 [Stevens and Blackmun, JJ., dissenting-"... agree[ing] with J. Ginsburg that the officer's incomplete testimony at the preliminary hearing perpetuated the violation of Plaintiff's right to be free from unreasonable seizure, ante at 815']; Singer v. Fulton County Sheriff, 63 F. 3d at 115, n.4 and 117,n.6; Woods v. Candela, 1995, 47 F. 3d 545 [2nd Cir.]).

Thus, in view of the foregoing it is clear that the district court erred in carving up Respondnet's §1983 claim into common-law tort catagories and dismissing portions of Respondent's §1983 claim as time-barred.

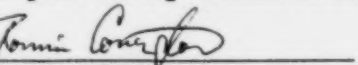
CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

DATED: August 25, 1999
Dannemora, New York

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 25, 1999.

Respectfully Submitted,



Ronnie Covington
93 A 6800
Respondent, pro-se
Clinton Correctional Facility
P.O. Box 2001
Dannemora, N.Y. 12929

RESPONDENT'S
APPENDIX

BEST AVAILABLE COPY

John E. Daly
Attorney at Law

Direct Dial 212.969.3419
jdaly@proskauer.com

April 8, 1999

BY HAND

The Honorable William H. Pauley III
United States District Court
Southern District of New York
40 Centre Street, Room 234
New York, New York 10007

e: Covington v. City of New York (94 Civ. 2434)

ar Judge Pauley:

represent plaintiff Ronnie Covington in the above-referenced action, and write to call the rt's attention to a recent Second Circuit decision that demonstrates that this Court's earlier issal of plaintiff's claims of false arrest and false imprisonment on statute of limitations nds. We thus request that the Court reconsider its dismissal of the false arrest and false sonment claims against defendant Police Officer Thomas Kid in light of this new precedent.

new decision, *Covington v. City of New York*, No. 96 Civ. 2026, 1999 U.S. App. LEXIS 2d Cir. Mar. 18, 1999) (copy attached at Exh. 1), the Second Circuit Court of Appeals d the dismissal of false arrest claims brought by plaintiff Ronnie Covington (in an action ed to the instant lawsuit). In that case, the district court dismissed Mr. Covington's claims ely because they were filed more than three years after the date the arrest took place. g the district court, the Second Circuit held that the false arrest claims may have not on the date of the false arrest, but instead on the date the related criminal gs terminated. The Court held that the claims would accrue on the date the criminal gs terminated "[i]f a favorable determination on the false arrest claim would in fact rmined the validity of any potential conviction against Covington resulting from the al proceedings . . . ." *Id.* at *3. The Court explained that "in a case where the only r conviction was obtained pursuant to an arrest, recovery in a civil case based on false

Office of the Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Fax Transmission

To:	John E. Daly Elizabeth I. Hook	**From:**	Orrit Hershkovitz
Company:		**Date:**	April 16, 1999
Fax #:	(212) 969-2900		

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RESPONDENT'S APPENDIX - Page #2

Gen. Lit.

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

MICHAEL D. HESS
Corporation Counsel

ROOM 2-112
TEL.: (212) 788-0889

April 16, 1999

BY HAND

Honorable William H. Pauley III
United States District Judge
Southern District of New York
40 Centre Street, Room 234
New York, NY 10007

Re: Covington v. Kid, 94 Civ. 4234 (WHP)

Dear Judge Pauley:

I write to inform the Court that defendant will not oppose plaintiff's request for reinstatement of his false arrest claim against Detective Kid.

Respectfully submitted,

Orrit Hershkovitz
Assistant Corporation Counsel

cc: John E. Daly (by fax)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RONNIE COVINGTON,

Plaintiff,

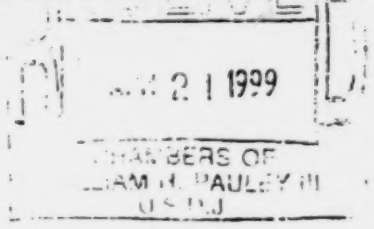
v.

POLICE OFFICER THOMAS KID,

Defendant.

94 Civ. 4234 (WHP)

STIPULATION OF REINSTATEMENT OF CLAIM



IT IS HEREBY STIPULATED AND AGREED by the undersigned attorneys for the parties to this action, as follows:

Plaintiff's claim of false arrest against Police Officer Thomas Kid, as set forth in the Second Amended Complaint, is hereby reinstated on the consent of both parties.

Dated: April 21, 1999
New York, New York

PROSKAUER ROSE LLP

By: _____
John Daly (JD 2777)
Elizabeth I. Hook (EH 2496)
1585 Broadway
New York, New York 10036
(212) 969-3419
Attorneys for Plaintiff Ronnie Covington

THE CITY OF NEW YORK,
LAW DEPARTMENT

By: _____
Orrit Hershkovitz, Esq.
Assistant Corporation Counsel
100 Church Street
New York, New York 10007
(212) 788-0889
Attorneys for Defendant Thomas Kid

SO ORDERED:

_____
United States District Judge

98-2007

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, et al.,
PETITIONERS

VS.

RONNIE COVINGTON,
RESPONDENT

PROOF OF SERVICE

I, RONNIE COVINGTON, do swear or declare that on this date, August 25, 1999, as required by Supreme Court Rule 29 I have served the enclosed Motion For Leave To Proceed In Forma Pauperis and Brief In Opposition To The City Of New York's Petition For A Writ Of Certiorari on Petitioners' counsel by submitting an envelope containing the above documents to prison officials along with prison disbursement forms and Authorized Advance Forms properly addressed to Petitioners' counsel for authorization for proper postage, delivery and mailing, via First Class Mail.

The name and address of Counsel served is as follows:

Michael D. Hess,
Corporation Counsel of the City of New York
Department of Law
100 Church Street
New York, N.Y. 10007

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 1999.

Ronnie Covington
93 A 6800
Respondent, pro-se
Clinton Correctional Facility
P.O. Box 2001
Dannemora, N.Y. 12929

Clinton Correctional Facility
P.O. Box 2001
Dannemora, N.Y. 12929

August 25, 1999

Hon. William K. Suter,
Court Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

RE: City of New York, et al., versus
Covington--No. 98-2007

Dear Clerk:

I am the Respondent, pro-se, in the above referenced case and as such am fully familiar with the facts and circumstances therein.

I have enclosed herein my Respondent's Brief and Opposition to the Petitioners' Petition For A Writ of Certiorari, my In Forma Pauperis application, and my Declaration of Service upon the Petitioners' counsel, one original copy each enclosed in accordance with Rule 15(3) of the Rules of the United States Supreme Court.

In any event, please deliver same to the Justices of this honorable Court, for their consideration thereon.

Your cooperation in this matter will be most gratefully appreciated!

Respectfully Submitted,

Ronnie Covington
93 A 6800

Enclosures

cc: Michael D. Hess,
Counsel for Petitioners

Files

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